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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-620

In the Matter of

Amendment of Section 73.202(b), RM-7577
Table of Allotments,
FM Broadcast Stations.
(Decorah, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 30, 1991; Released: August 12, 1991

By the Chief, Allocations Branch:

1. At the request of Viking Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7680 (1990), proposing the allotment of Channel 284A to Decorah, Iowa, as the community's second FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Comments were filed by KOEL AM/FM opposing the proposal. [1] Petitioner filed reply comments.

2. KOEL AM/FM, licensee of Stations KOEL AM and FM, Oelwein, Iowa, argues that there is no need to allot an additional station to the area. It claims that there are already at least 12 stations competing for a share of a limited advertising budget in the Decorah market. Additionally, KOEL AM/FM contends that the public interest would not be served if the authorization of another station caused a current station to go off the air because of a lack of revenue.

3. In its reply comments, petitioner states that the opposition to the proposed allotment is based on economic grounds, that the Commission has long held that purely economic arguments against proposed new FM allotments are not persuasive, and that such arguments will no longer be considered in the context of individual allotment rule making proceedings. Petitioner cites to *FM Channel Assignments*, 47 FR 2870 (1982); *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *aff'd*. 4 FCC Rcd 2276 (1989), in support of its contention. Petitioner also reiterates its intention to apply for the channel.

4. It is the Commission policy, as correctly stated by the petitioner, that economic impact arguments in opposition to proposed new FM allocations are not persuasive and are no longer valid. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, supra*. Therefore, we believe that the public interest would be served by the allotment of Channel 284A to Decorah, Iowa, since it would provide the community with its second local and first competitive FM service. Channel 284A can be allotted to Decorah in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.1 miles) southwest to avoid a short-spacing to Station WLXR-FM, Channel 285A, La Crosse, Wisconsin. [2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 26, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Decorah, Iowa	263C2, 284A

6. The window period for filing applications will open on **September 27, 1991,** and close on **October 28, 1991**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Opposing comments were also received from KQYB-FM, licensee of Station KQYB-FM, Spring Grove, Minnesota, and Decorah Radio, Inc., licensee of Stations KDEC-AM and KRDI-FM in Decorah, Iowa. These comments, which present arguments similar to those of KOEL AM/FM, were not filed pursuant to Commission Rules 1.415 and 1.420 and, therefore, will not be considered.

[2] The coordinates for channel 284A at Decorah are North Latitude 43-16-16 and West Longitude 91-52-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-175

In the Matter of

Amendment of Section 73.202(b),	RM-7112
Table of Allotments,	RM-7540
FM Broadcast Stations.	
(Goleta and Santa Ynez,[1]	
California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 30, 1991; Released: August 12, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 1998 (1990), issued in response to a petition filed by Eric R. Hilding ("petitioner"), proposing the allotment of FM Channel 290A to Goleta, California, as that community's second local aural transmission service. Petitioner and Miklos Benedek ("Benedek") each filed supporting comments in response to the *Notice*. KPWR, Inc. ("KPWR"), licensee of Station KPWR(FM), Channel 290B, Los Angeles, California, filed opposing comments. Robert Kitamura ("Kitamura") filed comments and a counterproposal, requesting the allotment of Channel 290A to Santa Ynez, California, as that community's first local aural transmission service. [2] Petitioner and KPWR each filed reply comments.

2. KPWR contends, *inter alia*, that although a second adjacent channel to the present allotment of Channel 292A at Goleta is possible from a restricted site, the request is technically deficient. In particular, KPWR claims that adoption of the proposal would undoubtedly create mutual interference between existing Station KMGQ(FM), Channel 292A, Goleta, resulting in the inability of some area receivers to distinguish between the two signals. Additionally, KPWR asserts that the proposal would preclude Station KMGQ(FM) from attaining any improvement beyond the maximum for 3 kW operation. KPWR adds that the Goleta proposal would also cause interference to its co-channel Station KPWR(FM), Channel 290B, Los Angeles, based on the methodology and interference ratios set forth in Section 73.215 of the Commission's Rules. Finally, KPWR advises that because Goleta is part of the Santa Barbara urbanized area, the community is currently well served by six FM stations as well as five AM stations. Thus, KPWR advocates denial of the Goleta proposal.

3. Kitamura's counterproposal urges that Santa Ynez (population 3,335), [3] is more deserving of a first local aural transmission service since Goleta presently receives local aural service from Station KMGQ(FM), Channel 292A. Kitamura stated his intention to apply for Channel 290A if it is allotted to Santa Ynez.

4. KPWR's reply comments reiterate its opposition to the Goleta proposal based upon its previously stated alleged technical deficiencies. In further support of its allegations, KPWR's engineering statement denotes that the reference coordinates specified in the *Notice* appear to plot the transmitter for Channel 290A at Goleta off-shore. Moreover, according to KPWR, the site specified by the petitioner at Goleta is equally defective since its location in the Santa Ynez Mountains would not provide a 70 dBu contour over any portion of the community, in violation of the requirements of Section 73.315(a) of the Commission Rules.

5. Petitioner's reply comments recognize that the first local service proposal at Santa Ynez is meritorious and therefore withdraws his expression of interest in the proposed use of Channel 290A at Goleta. [4] Thus, in accordance with Commission policy, we will give no further consideration to the petitioner's expression of interest at Goleta. However, since the expression of interest filed by Benedek was not withdrawn, we must consider the two proposals on a comparative basis.

6. A staff review indicates that Goleta and Santa Ynez are located 21.7 kilometers (13.4 miles) apart, whereas a distance of 115 kilometers (71 miles) is required between co-channel Class A allotments. A staff engineering review reveals that Channel 290A is the only channel which may be allotted to either community. Therefore, our decision shall be based on the Commission's allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) first fulltime aural service

(2) second fulltime aural service

(3) first local service

(4) other public interest matters

[co-equal weight given to priorities (2) and (3)]

7. Neither of the proponents demonstrated that the requested allotment of Channel 290A to either Goleta or Santa Ynez would provide any first or second fulltime aural reception service, thus eliminating priorities (1) and (2) enumerated above. However, Channel 290A would provide a first local aural transmission service to Santa Ynez (priority (3)), whereas Station KMGQ(FM) is licensed at Goleta. Therefore, the allotment of Channel 290A to Goleta would provide that community with a second local aural transmission service (priority (4)). As a

[1] The community of Santa Ynez, California, has been added to the caption.

[2] Public Notice of the counterproposal was given November 13, 1990, Report No. 1828.

[3] Population figures are taken from the 1980 U.S. Census.

[4] Petitioner's withdrawal of interest was filed prior to October 4, 1990. Therefore, the requirements of Section 1.420(j) of the Commission's Rules, concerning abuses of the Commission's processes in the allotment context, are not applicable in this proceeding.

result of the above analysis, Santa Ynez is afforded the higher priority, and must be preferred over the Goleta proposal.

8. Channel 290A can be allotted to Santa Ynez consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.[5]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 26, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Santa Ynez, California	290A

10. IT IS FURTHER ORDERED, That the petition for rule making to allot Channel 290A to Goleta, California (RM-7112), IS DENIED.

11. The window period for filing applications on Channel 290A at Santa Ynez, California, will open on **September 27, 1991,** and close on **October 28, 1991**.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] Coordinates used for Channel 290A at Santa Ynez are 34-36-48 and 120-04-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-233

In the Matter of

Amendment of Section 73.202(b), RM-7743
Table of Allotments,
FM Broadcast Stations.
(Armijo, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 30, 1991; Released: August 12, 1991

Comment Date: October 3, 1991
Reply Comment Date: October 18, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Matteucci Broadcasting Company, Inc. ("petitioner"), licensee of Station KMYI(FM), Armijo, New Mexico, requesting the substitution of Channel 296C for Channel 296C2 and modification of its license to specify operation on the higher class channel. [1]

2. A Commission engineering analysis reveals that Channel 296C can be substituted for Channel 296C2 at Armijo, New Mexico, in compliance with the Commission's minimum distance separation requirements with a site restriction of 47.3 kilometers (29.4 miles) southeast of the community at petitioner's specified site. The site restriction is necessary to avoid short-spacings to Stations KBOM(FM), Channel 294C1, Los Alamos, New Mexico, and KHFM(FM), Channel 242C, Albuquerque, New Mexico. [2]

3. We believe the public interest would be served by proposing the substitution of Channel 296C for 296C2 at Armijo, New Mexico, and modifying the license of Station KMYI(FM) at Armijo, because it would permit Station KMYI to expand its service area. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 296C at Armijo, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Armijo, New Mexico	296C2	296C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 3, 1991,** and reply comments on or before **October 18, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William E. Kennard, Esq.
Verner, Liipfert, Bernhard, McPherson and Hand
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] On June 13, 1991, the Commission granted an application (File No. BALH-910426EE) for assignment of license of Station KMYI to KCST, Inc. Petitioner states that upon consummation of the assignment of license, KCST, Inc. will apply for the upgraded facilities, if granted. We note, however, that, if consummation has occurred, the assignee should file a continuing expression of interest before the comment deadline; otherwise, the assignor should file the requisite statement of continuing interest. *See infra* para. 5.

[2] The coordinates of Channel 296C at Armijo are North Latitude 34-41-46 and West Longitude 106-24-17.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-234

In the Matter of

Amendment of Section 73.202(b), RM-7745
Table of Allotments,
FM Broadcast Stations.
(Hastings, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 30, 1991; Released: August 12, 1991

Comment Date: October 3, 1991
Reply Comment Date: October 18, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Heartland Radio, Inc. ("petitioner"), licensee of Station KEZH(FM), Hastings, Nebraska, requesting the substitution of Channel 268C for Channel 268C2 and modification of its license to specify operation on the higher class channel. Petitioner states that it will apply for the upgraded facilities, if granted.

2. We believe the public interest would be served by proposing the substitution of Channel 268C for 268C2 at Hastings, Nebraska, and modifying the license of Station KEZH(FM), because it would permit Station KEZH to expand its service area. The substitution can be made consistent with the Commission's minimum distance separation requirements from the site specified by the petitioner, which is located 41.5 kilometers (25.8 miles) west of Hastings. [1] The proposal for Hastings must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding the Commission's monitoring station at Grand Island, Nebraska. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 268C at Hastings, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hastings, Nebraska	251C, 268C2	251C, 268C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 3, 1991,** and reply comments on or before **October 18, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William D. Silva, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 268C at Hastings are North Latitude 40-39-28 and West Longitude 98-52-04.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 12, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exits.

The following Managing Director decisions are released for information:

U.S. Satellite Corporation - Request for fee determination for an application for modification of its satellite Earth Station E2595 (File No. CSG-91-025-ML) and subsequent recission of bills for additional fees for three U.S. Satellite applications (Bill Nos. 1CGX50000 - ICGX50002)-Common Carrier Bureau determined that all applications involved should be treated as a request to modify a single Earth Station. - **Dismissed as Moot** (July 25, 1991).

Mirgon, Frank H., et al- Request for an aggregate partial fee refund involving eight applicants for cellular radio systems - **Granted** (July 25, 1991).

Toole, Devaughn and Mary L. Toole, d/b/a Toole & Company - Request for Reconsideration of refund of hearing fee submitted for a new FM broadcast station on Channel 251A at Eufaula, Alabama - **Granted** (July 25, 1991).

McCaw Cellular Communications, Inc. Request for Refund of filing fees in connection with numerous applications for transfers of control, reflecting a restructuring of the company - **Granted** (July 25, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nonsubstantive Amendment of
Part 97 of the Commission's
Rules Governing the Amateur
Radio Service.

ORDER

Adopted: July 29, 1991; Released: August 12, 1991

By the Chief, Private Radio Bureau:

1. The line entry for the 1.25 m band in the frequency table in Section 97.301(a) of the Commission's Rules, 47 C.F.R. § 97.301(a), incorrectly references paragraph (b). In that line entry, under the column headed "Sharing requirements," the reference should be to paragraphs (a) and (e) of Section 97.303 of the Commission's Rules, 47 C.F.R. § 97.303.

2. The line entry for the 23 cm band in the frequency table in Section 97.301(a) of the Commission's Rules, 47 C.F.R. § 97.301(a), incorrectly references paragraph (j). In that line entry, under the column headed "Sharing requirements," the reference should be to paragraphs (h) and (i) of Section 97.303 of the Commission's Rules, 47 C.F.R. § 97.303.

3. The line entry for the 1.2 cm band in the frequency table in Section 97.301(a) of the Commission's Rules, 47 C.F.R. § 97.301(a), incorrectly references paragraph (i). In that line entry, under the column headed "Sharing requirements," the reference to paragraph (i) should be changed to paragraph (h) of Section 97.303 of the Commission's Rules, 47 C.F.R. § 97.303.

4. In addition, the text of Section 97.303(i) should be amended to include the aeronautical radionavigation service and the radiolocation service in order to conform paragraph (i) to the Table of Frequency Allocations in Section 2.106 of the Commission's Rules, 47 C.F.R. § 2.106.

5. Because the rule amendments adopted herein are nonsubstantive in nature, the notice and comment provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, need not be complied with. Authority for this action is contained in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1).

6. Accordingly, Part 97 IS AMENDED, effective **September 30, 1991,** as set forth in the Appendix below.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

The following is a summary of the comparisons of the population of the counties within the predicted gain areas of a Class B service contour versus those of a Class B1 service contour for Station KEWE(FM), Channel 249A, Oroville, California. Also shown is the predicted increase in population coverage in the gain area of a Class B1 contour for Station KMGG(FM), Channel 249A, Monte Rio, California. Our analysis used the 1.0 mV/m field strength as the primary service contour for comparing each stations' areas of proposed coverage. The percentages of increase indicates the predicted increase in coverage by Class B and Class B1 facilities over their existing Class A coverage in the listed counties.

In this study, cities with populations greater than 5,000 were given special consideration. Their populations were subtracted from the total populations of the counties in which they are located, and the remaining population of each county was assumed to be uniformly distributed throughout that particular county.

Class B (Oroville)

Counties

Butte (increase from 30% to 95%) pop. 85,994 x 65% = 55,896

Plumas (increase from 0% to 10%) pop. 17,340 x 10% = 1,734

Sierra (increase from 0% to 25%) pop. 3,073 x 25% = 768

Nevada (increase from 0% to 25%) pop. 44,948 x 25% = 11,237

Yuba (increase from 40% to 80%) pop. 20,681 x 40% = 8,272

Sutter (increase from 0% to 20%) pop. 33,510 x 20% = 6,702

Glenn (increase from 0% to 5%) pop. 21,350 x 5% = 1,068

Tehama (increase from 0% to 1%) pop. 29,398 x 1% = 294

Subtotal **85,971**

The community of Oroville (pop. 8,683, in Butte County) is already covered by the existing Class A service contour of Station KEWE(FM), is not in the gain area, and its population has not been included in the total.

The community of Red Bluff (pop. 9,490, in Tehama County) is not covered by the proposed Class B primary service contour, is not in the gain area, and its population has not been included in the total.

The community of Olivehurst (pop. 8,929, in Yuba County) is not covered by the proposed Class B primary service contour, is not in the gain area, and its population has not been included in the total.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-599

In the Matter of

Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules regarding the establishment of a Personal Emergency Locator Transmitter Service. RM-6681

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1991; Released: August 12, 1991

By the Commission:

I. INTRODUCTION

1. On December 12, 1989, the Commission adopted a *Notice of Proposed Rule Making* (4 FCC Rcd 8657, 1989) in the above captioned matter. The NPRM was issued in response to a petition filed by Kenneth J. Seymour and proposed to establish a Personal Emergency Locator Transmitter Service (PELTS) to provide individuals in remote areas a means to alert others of an emergency situation and to help search and rescue personnel locate those in distress. The Commission sought comments on various questions and options that would make the proposed service as efficient and effective as possible. In view of the comments received no further action in this matter is proposed at this time.

II. BACKGROUND

2. In order to (1) provide for centrally-coordinated radio communications capability for use by the general public in remote areas to reduce response time in emergency situations, and to (2) reduce the illegal use of emergency locator transmitters (ELTs) and emergency position indicating radiobeacons (EPIRBs), we proposed to establish a new radio service. This new service was proposed to be one of the Personal Radio Services under Part 95 of the Commission's Rules, 47 C.F.R. Part 95. Eligibility for base station operation in the new service was restricted to governmental entities and private organizations who provide a search and rescue service and are recognized as providing such by a governmental entity. Eligibility for mobile operation was unrestricted. We proposed to use shared use frequencies in the newly allocated 220-222 MHz band, which was set aside for amplitude compandored single sideband (ACSB) technology, to stimulate the introduction of narrowband technologies. The proposed channel plan reserved two frequency pairs for full duplex voice communications between persons needing assistance and a watch and response center. The remaining channels were divided into six single channels, one for one-way non-commercial information-type messages, one for non-voice emergency alerting and homing operation, and four channels for short-distance simplex communications. To increase the utility and improve the efficiency of the search and rescue operations, we proposed to establish interoperability standards and design parameters for equipment. Finally, we noted that without a corresponding watch and response system, the proposed emergency communciations capability would be ineffective.

III. COMMENTS

3. Timely comments were filed by over 50 parties (*See* appendix A for list of commenters). Reply comments were filed by 8 parties. While all the commenters agreed that a service such as PELTS could prove valuable in search and rescue work, there were many divergent views regarding the specific proposal. Commenters raised serveral areas of concern. Each area is discussed below. First, many commenters argued that the technical requirements of PELTS would make the equipment too expensive for use by the general public. Maxon Electronics noted that the technical performance requirements of ACSB are not readily compatible with the objective of low cost and may make the equipment too expensive for the very people it is intended to serve.[1] Teleonics, Inc., a manfacturer of wildlife tracking and search and rescue systems, believed that the highly integrated voice/emergency two-way PELTS concept limited its usefulness because it would reduce the number of individuals who can afford the system.[2] Beyond the expense of the equipment there was concern over the time necessary to develop a PELTS infrastructure. [3] L-Tronics, a manufacturer of direction finding equipment for locating ELTs and EPIRBs suggested that few government or private organizations are going to be able to afford and support a system that lacks in-place monitoring systems and locating devices to serve the new PELTS.[4] Indeed there was a concern that local/state governments and search and rescue organizations with minimual budgets would not be capable of investing the needed resorces to develop comprehensive networks or the manpower necessary for monitoring the system.[5]

4. In addition to cost factors the commenters were concerned about difficulty and expense of providing reliable coverage. Numerous base stations and possibly repeaters were identified as needed to provide coverage in mountainous terrain.[6] The Sierra Madre Search & Rescue Team stated that simplex coverage in mountainous areas, even with numerous stations would be difficult.[7] While the PELTS was proposed to meet definite needs in certain localities and eventually develop into a complement to satellite systems, many commenters expressed a need for a less geographically limited system. Indeed, the National Association of Search and Rescue felt that COSPAS/SARSAT not only offered the best hope for their needs but that the interim development of PELTS might hinder implementation of COSPAS/SARSAT satellite technology for distress alerting.[8]

5. Many search and rescue organizations expressed concern that PELTS would be another layer of communications systems over already strained resources.[9] Adding PELTS at 200-222 MHz would not only add confusion by increasing the number of frequencies a coordinator had to monitor but cause financial hardship as well.[10] Law enforcement agencies responsible for SAR activities expressed reservation about the compatibility of PELTS with

their current systems. Bernaillo County Sheriff's Department expressed the view that they were better served by 800-900 MHz systems that are becoming affordable and dependable.[11] Some Civil Air Partrol (CAP) units suggest that they may be unable to purchase required direction finding equipment and recommend using exisitng 121.5 frequencies to utilize current equipment.[12]

6. The search and rescue organizations also are very concerned about potential liability exposure that could result from participating in PELTS. While it is not within the scope of the Commission's authority to limit liability, the threat of legal action is becoming a major concern of the emergency response community.[13] Many cases of well-intentioned rescuers exposed to personal liability because a victim was not "reached quickly enough" have occured and litigation continues today.

7. Another widespread concern was possible system abuse and false alarms. General recreational use of the frequencies could turn the mobile-to-mobile channels into "chatter channels"[14] in not only remote but urban and suburban areas. As the American Radio Relay League noted:

> As a general premise, once radio transmitters with two-way voice capability are made available to the general public, it becomes impossible to limit the use to which they will be put.[15]

The potential of millions of PELTS mobiles sold to the general public caused concern that users would be prone to "try out" their units and reporting emergencies that in fact do not require assistance. Search and rescue organizations could find themselves responding to these accidental or malicious activations and wasting their resources.[16]

IV. DISCUSSION

8. In the Notice of Proposed Rule Making we stressed that the radio communications capabilities of PELTS was only half the picture, without a corresponding watch and response system, the communciations capabilities would be ineffective. Although there was general support for the concept of PELTS no one indicated an intention to expend the resources necessary to promote and develop narrowband PELTS technology. Only one organization expressed any willingness to provide a watch and response capability.[17] Most search and rescue organizations expressed the view as stated by Portland Mountain Rescue (PMR):

> The proposed watch center (base station) funding, maintenance and manning do not appear to be responsibilities which are mandated by our bylaws. PMR is a response-oriented organization of trained volunteers. Watch center manning would likely be viewed as a sedate activity with little appeal to PMR members. Thus PMR does not believe that we have a primary role in the initial notification phase of a SAR activity.[18]

Based on the comments it does not appear that a watch and response system so critical to the success of PELTS will materialize. Further, this lack of support to promote and develop the technology necessary for PELTS would result in uneven usage and a lack of uniformity of emergency communication service.

9. The commenters generally concluded that geographical limitations of PELTS were a concern especially in mountainous areas. The Mountain Signal Memorial Fund suggested that the best and possibly only current technology for alerting response personnel is the use of a satellite system. Not only are terrestrial systems more expensive due to the number of base stations needed but such problems with de-icing mountainous antennas and constructing antennas in wilderness areas to maintain coverage would make the cost PELTS prohibitive.[19] While in the NPRM we proposed an area-wide, centrally-coordinated radio communication capability for use by the general public in remote areas, we emphasized a local system approach. The comments suggest that even at a local level the costs of building and maintain a PELTS network would be prohibitive.[20]

10. Commenters also expressed reservations about their ability to add a PELTS system which they view as yet another layer of communications systems to organizations that could least afford the added expense. Not only would this strain their resources finanically but it would also create another system that organizations would have to monitor and coordinate responses to emergencies. Since a large number of the organizations are volunteer organizations that are self-supporting, resources are not readily available. Several commenters suggested that licensing and regulation might be better placed under the Special Emergency Radio Service of Part 90 where eligibility and frequency coordination licensing procedures are already in place.[21] The NW ELT Team, Inc. pointed out that in they currently use 155.160, 155.265 and 155.340 MHz for SAR activities. Another suggestion was that existing systems such as those for ELTs and EPIRBs would have a greater chance of success than to develop a brand new system.[22] The Louisiana Wing of the Civil Air Patrol best summed up the feeling by saying that the proposed service would not be a public benefit because the search and rescue capability to make it work does not exist and would not exist in the near future because of the cost.

11. Search and rescue organizations state that their concern over the potential liability of participating in PELTS would cause them to be hesitant to participate. The Interagency Committee on Search and Rescue believed that until a base station operator communicated the intension to respond to someone in distress that liability will be minimal, however, this will vary according to various jurisdictions.[23] This issue has been addressed by the Mountain Signal Memorial Fund in Oregon which worked with the Oregon Legislature to enact an Oregon State Statute Bill 915[24] that brought about new tort laws addressing the liability problem. This provides some protection but not sufficient to eliminate the reluctance of organizations to participate in a PELTS system. The unsettled nature of the liability question and the legal trend of pursuing large damage suits would likely preclude knowledgeable search and rescue individuals and organizations from participating in PELTS.

12. Finally, search and rescue organizations expressed great concern for the potential for system abuse. The mobile-to-mobile voice capability could be misused and easily create another Citizen's Band experience of millions of radio users with inadequate or no discipline. This could lead to large numbers of false alarms and cor-

responding responses by search and rescue organizations. This could detract from search and rescue performances during true emergencies.[25] While we proposed restricting base station eligibility and blanket licensing to assure that the frequencies will be used for distress as well as search and rescue communications the comments did not support these measures as being effective.

V. CONCLUSION

13. We have reviewed these comments carefully and seriously evaluated all the specific suggestions. After weighing the merits, however, we believe that at this time PELTS would not adequately meet public's needs for emergency communications in remote areas nor assist search and rescue personnel in locating individuals in distress. Therefore, we are terminating this proceeding and return the frequencies to the Land Mobile Radio Service. We will continue to look to Interagency Committee for Search and Rescue for guidance on the matter of personal locating beacons.

VI. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, That the petition of Kenneth J. Seymour, RM-6681, IS DISMISSED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

1. Advanced Mobilecomm, Inc.
2. American Mobile Satellite Corp.
3. American Radio Relay League, Inc. (ARRL)
4. Arent, Fox, Kintner, Plotkin & Kahn
5. Associated Public-Safety Communications Officers, Inc. (APCO)
6. Association of American Railroads
7. Atlantic Research Corp.
8. Bernalillo County Sheriff's Dept (New Mexico)
9. Boca Raton Senior Squadron, Civil Air Patrol (CAP)
10. Cassidy, Brian
11. Circuit Graphics, Inc.
12. Department of Defense
13. Dr. Michael Trahos
14. DuBois, George
15. Electronic Tracking Systems, Inc.
16. Forest Industries Telecommunications
17. Geostar Corporation
18. Grays Harbor County Sheriff Depa-tment
19. Greater Philadelphia Search and Rescue
20. Hess, David
21. Interagency Committee on Search and Rescue
22. King, Alan & Linda
23. Kotas, Ronald
24. L-Tronics
25. Larranaga, Gaston
26. Louisiana Wing, Civil Air Patrol (CAP)
27. Massachusetts Wing, Civil Air Patrol (CAP)
28. Maxon Electronics, Inc.
29. Mountain Rescue Association
30. Mountain Signal Memorial Fund
31. National Aeronautics and Space Administration (NASA)
32. National Association for Search and Rescue (NASAR)
33. National Association of Business and Educational Radio, Inc. (NABER)
34. National Oceanic and Atmospheric Administration, SARSAT Operations Division
35. New York State Dept of Environmental Conservation
36. Northwest Passage Outing Club
37. Orbital Communications Corp. (ORBCOMM)
38. Pennsylvania Wing, Civil Air Patrol (CAP)
39. Personal Radio Steering Group
40. Portland Mountain Rescue
41. Protection Systems
42. Radio Emergency Associated Communications Teams (REACT), International, Inc.
43. Reasner, Jerry
44. Rudawitz, David
45. SEA, Inc.
46. Sierra Madre Search & Rescue Team
47. Summit County Rescue Group
48. SureTrak
49. Talanian, William
50. Teleonics, Inc.
51. The NW ELT Team, Inc.
52. Townsend, Karl
53. United Parcel Service, Inc. (UPS)
54. United Search and Rescue of Montezuma County, Inc.
55. Utah County Sheriff's Search and Rescue
56. Washoe County Sheriff's Offices
57. Weber, Gunn, Nicholson & Nordeen
58. Wolos, Joseph

REPLY COMMENTS

1. Advanced Mobilecomm, Inc.
2. American Radio Relay League, Inc. (ARRL)
3. National Aeronautics and Space Administration (NASA)
4. National Association of Business and Educational Radio, Inc. (NABER)
5. Orbital Communications Corporation (ORB-COMM)
6. Personal Radio Steering Group
7. Technical Committee - Region 20 Public Safety Planning Committee
8. United Parcel Service, Inc. (UPS)

FOOTNOTES

[1] *See* Maxon Comments at 4 and 5.

[2] *See* Teleonics Comments at 12 and 13.

[3] *See* Protection Systems Comments at 34; Kenneth Weber Comments at 3; UPS Comments at 20; Advanced Mobilecomm, Inc. Reply Comments at 3.

[4] *See* L-Tronics Comments at 1.

[5] *See* Personal Radio Steering Group Comments at 10.

[6] *See* Interagency Committee for Search and Rescue Comments at 3; United Search and Rescue of Montezuma County, Inc. Comments at 1.

[7] *See* Sierra Madre Search and Rescue Team Comments at 1; Portland Mountain Rescue Comments at 2.

[8] *See* National Association of Search and Rescue at 1.

[9] *See* National Assoication of Search and Rescue Comments at 1; Sierra Madre Search and Rescue Comments at 2; Washoe County Sheriff's Office Comments at 1.

[10] *See* The NW ELT TEAM, Inc. Comments at 3.

[11] *See* Bernaillo County Sheriff's Department Comments at 1.

[12] *See* Massachusetts Wing, Civil Air Patrol Comments at 1; Louisiana Wing, Civil Air Partrol Comments at 1.

[13] *See* National Association of Search and Rescue Comments at 1.

[14] *See* Summit County Rescue Group Comments at 2.

[15] *See* American Radio Relay League Comments at 4.

[16] *See* Sierra Madre Search & Rescue Team Comments at 2.

[17] *See* Summit County Rescue Group Comments at 1.

[18] *See* Portland Mountain Rescue Comments at 1.

[19] *See* Mountain Signal Memorial Fund Comments at 6.

[20] *See* L-Tronics Comments at 1; United Parcel Service, Inc. Comments at 11; Massachusetts Civil Air Patrol Comments at 1; Karl Townsend Comments at 1; The NW ELT Team, Inc. Comments at 5; Portland Mountain Rescue Comments at 2; United Search and Rescue of Montezuma County, Inc. Comments at 1.

[21] *See* Mountain Rescue Association Comments at 1; Portland Mountain Rescue Comments at 2.

[22] *See* Weber, Gunn, Nicholson & Nordeen Comments at 1.

[23] *See* Interagency Committee on Search and Rescue Comments at 2.

[24] Act Relating to Certain Liability, Oregon Sen. 915, 64th Leg., Regular Sess., (1987).

[25] *See* Mountain Rescue Association Comments at 2; The NW ELT team, Inc. Comments at 3; Sierra Madre Search and Rescue Team Comments at 2; Summit County Rescue Group at 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v.

MID-COM ASSOCIATES,	File No. E-90-29
THE 800 ASSOCIATION, INC.,	File No. E-90-30
TELEPOOL NETWORK, INC.,	File No. E-90-31
TELECOM ANALYSIS, INC.,	File No. E-90-32
INTERNATIONAL TELECOM GROUP, INC.,	File No. E-90-33
CONSOLIDATED COMMUNICATIONS GROUP, INC.,	File No. E-90-34
ADVANCE NETWORK DESIGN,	File No. E-90-35
D'MARTINE FINANCIAL SERVICES, INC.,	File No. E-90-36
ELITE 800, INC.,	File No. E-90-37
800 AGGREGATOR, LTD.,	File No. E-90-105
CYNCOM AND ASSOCIATES,	File No. E-90-106
ASSOCIATED NETWORKS, INC.,	File No. E-90-107
COMAC, INC. and	File No. E-90-108
GARDEN STATE LONG DISTANCE TELEPHONE,	File No. E-90-109
Defendants.	

ORDER

Adopted: August 5, 1991; Released: August 12, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 11, 1989, MCI Telecommunications Corporation ("MCI") filed formal complaints against the above captioned defendants alleging that the defendants were violating Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a), in connection with their aggregation of AT&T's 800 Service. [1] On July 25, 1991, however, MCI filed requests for withdrawal of the complaints, indicating that it does not wish to pursue its claims against the defendants.

2. On the basis of the statements contained in the requests, we conclude that the public interest would be served by granting MCI's requests.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that MCI's requests to withdraw complaints ARE GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

[1] MCI filed supplements to its complaints against Consolidated Communications Group, Inc., Advanced Network Design, D'Martine Financial Services, Inc. and Elite 800, Inc. on October 18, 1989, and against 800 Aggregator, Ltd., Cyncom & Associates, Associated Networks, Inc., Comac Inc., and Garden State Long Distance Telephone on January 16, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with	RM-7249
Local Telephone	ENF-87-14
Company Facilities	

ERRATUM

Released: August 6, 1991

On June 6, 1991, the Commission released a Notice of Proposed Rulemaking and Notice of Inquiry in this proceeding, CC Docket No. 91-141. Below are several corrections to this item:

Footnote 1 in Paragraph 1 should read:

> Tier 1 exchange carriers are those exchange carriers with more than $100 million in annual regulated revenues for a sustained period of time.

The first paragraph of Footnote 22 in Paragraph 23 should read:

> In the *ONA* proceeding, the Commission required that the BOCs, consistent with certain ONA criteria, permit ESPs and other customers access to the following BOC Operations Support Systems (OSS) functionalities, affecting the BOC facilities used by the customer: (1) service order entry and status; (2) trouble reporting and status; (3) diagnostics, monitoring, testing, and network reconfiguration; and (4) traffic data collection. In light of operational and privacy concerns, the Commission allowed ESPs as well as the BOC enhanced services operations to access these functions through a gateway. The Commission also required that the BOCs continue to pursue progress on access to OSS functionalities through the IILC and report back to the Commission in their April 1991 ONA Plan Amendments. *BOC Amended Plans Order*, 5 FCC Rcd 3108, 3107-3109 (1990). A CAP or other interconnecting party could also order BOC OSS functions available through the BOC ONA tariffs.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1991; Released: August 2, 1991

By the Chief, Common Carrier Bureau:

1. On May 17, 1991, the Common Carrier Bureau released an Order on service quality and infrastructure reporting in the above-captioned proceeding.[1] The *Service Quality Order* established reporting requirements for the quarterly and semiannual service quality reports and annual infrastructure reports required of price cap local exchange carriers (LECs).[2] On July 1 the LECs filed their first infrastructure and quarterly service quality reports. [3] On or about July 1, four LECs also filed waiver requests asking exemption from or time extensions for various filing requirements.[4] This Order addresses those waiver requests. This Order also directs some modifications of the filings of all LECs to achieve compliance with the *Service Quality Order*.

I. WAIVER REQUESTS

2. Bell Atlantic, filing on June 27, requests a waiver of requirements to provide average missed commitment on access service installations for Delaware and Pennsylvania for this quarter's report (stating that the data were inadvertently erased); any local service installation and repair interval reports for Pennsylvania and Delaware before first quarter 1992; and any MSA/non-MSA information for local service installations for all Bell Atlantic companies before first quarter 1992. SWB, filing on June 28, requests a waiver of requirements to file average missed commitment on access service installations (waive for two quarters' reports); total trouble reports for access service repairs (this quarter's report); and average intervals for access service repairs. SWB states that it was unaware of the Bureau's intention to require these data items, and so deleted its data back-up tapes. US West, filing on July 1, requests waiver of some filing requirements (specifically regarding installation and repair intervals, for both access and local service reports) for northern Idaho, explaining that while this is a separate study area, it is sparsely populated and remote, and little stand-alone data exists. Further, US West seeks permission to footnote its Idaho - South study area to reflect the exclusion of Malheur Telephone Company for this first quarterly report. Finally, US West states that data on total trouble reports and average repair interval are not available for January and February 1991, since its measurement system became operational only in March 1991. Nevada, filing on July 2, requests an extension of time to file access service total trouble reports and average interval for high-speed special access, from June 30 to August 19. Nevada states that its historic mechanized records are not maintained at this level of detail, that it is unable to derive the data manually, and that it must therefore modify its mechanized data process.

3. None of these carriers has presented adequate justification for filing such waiver requests at approximately the same time that the reports were due. Such tardy filing obviously does not permit consideration of waiver requests and carriers adjustments in response to a Bureau decision before the carrier files a report. Such contemporaneous waiver requests are particularly inappropriate in this instance. Bureau staff conducted extensive discussions with carriers, individually and through USTA, to develop practicable reporting requirements, and encouraged carriers to make the Commission aware of any need for waivers. We accordingly deny the waiver requests, apart from the US West request to defer filing of service quality data for Malheur Telephone Company until the September 30, 1991 filing.[5]

4. The carriers should file amended reports on or before August 19, 1991, in light of our decision to deny these waiver requests. Carriers that argue that data simply does not exist are directed to derive the required measures from data that does exist, or to provide carefully calculated estimates of the required measures.[6]

II. FILING COMPLIANCE

5. Our preliminary examination of the service quality and infrastructure reports filed on or about July 1 reveals that in some respects the LECs have failed to file according to our instructions.[7] Some carriers have reported "0" in several instances where "0" means not "zero," but "no data." In some cases this "0" is authorized by a waiver, or by specific language in the *Service Quality Order*; in some cases not. Other examples of non-compliance with the filing directions given in the *Service Quality Order* have also been found.

6. It is essential that the service quality and infrastructure reports provide a clear and thorough baseline from the beginning of LEC price cap regulation; to that end, the reports are carefully designed, after lengthy and detailed discussions with LECs, to gather the information we believe is necessary to our evaluation of LEC service quality and performance. Uniformity of the data and reporting formats is an important factor in the usefulness of the reports. Price cap LECs are accordingly directed to file corrected reports, taking cognizance of the waiver denials and the need for strict compliance with the *Service Quality Order* guidelines, on August 19, 1991. In addition, each LEC will file with its hard copies of the 43.05 and 43.07 reports, a cover letter detailing the changes it has made from its July 1 filing.[8]

7. In the interests of clarity and consistency, LECs should comply with the filing specifications provided by the Accounting and Audits Division. "Zero" (0) will be used only to indicate a numeric value of zero, and not to indicate that the data is withheld or unavailable.[9] Further, the common language location identifiers (CLLI) used in Table IV, Switch Downtime, should be 11 digit codes, not 8 digits as previously indicated. Questions regarding use of whole numbers, thousands, decimal places and other units of measurement are addressed in the Accounting

and Audit Division's specifications. The instructions for Table V, Service Quality Complaints (page 14 of 19 in Attachment C, Report 43-05, in the *Service Quality Order)* are revised to read:

> *Service Quality Complaints* - Service quality complaints are complaints on file with the state or federal regulatory authority, and pertaining to service quality. This term does not include complaints relating to billing, operator service providers, 900 or 976 services.

8. We note also that two carriers filed "restricted" and "unrestricted" versions of their reports, requesting confidential treatment of the restricted versions.[10] While Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, allows filing parties to make such a request, we note that both the Commission and the Bureau have stated the intention that these service quality and infrastructure reports be available for review by state commissions, interexchange carriers, and other interested parties, and that the Commission relies on such review as an integral part of its monitoring plan.[11] Under the circumstances, confidentiality requests are not appropriate.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the waiver petitions of Bell Atlantic, US West, Nevada Bell, and Southwestern Bell ARE DENIED except to the extent noted above.

10. IT IS FURTHER ORDERED that price cap LECs shall make such changes to their 43.05 and 43.07 (Quarterly Service Quality and Annual Infrastructure) reports as are herein described, and shall file these modified reports on August 19, 1991 as previously required.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com.Car.Bur. 1991) (*Service Quality Order) (recon. pending).*

[2] These reports will be included in the ARMIS system of automated reporting, and carry the following designations: 43.05, Quarterly Service Quality Report; 43.06, Semiannual Service Quality Report; and 43.07, Annual Infrastructure Report.

[3] Infrastructure reports are required only of the mandatory LECs, and were accordingly filed by Ameritech, Bell Atlantic, BellSouth, Contel, GTOC, NYNEX, Pactel, SWB, and US West. Quarterly service quality reports are required of all price cap LECs, and were filed by the same nine companies listed above. (Other elective price cap LECs began price cap regulation on July 1, and will file their first reports on September 30).

[4] Bell Atlantic, Nevada Bell, SWB, and US West filed waiver requests.

[5] To the extent that LECs requested postponement of their filing dates from July 1 to August 19, their requests are granted.

[6] Any data entry that reflects a calculation or estimate must be footnoted, and the calculation or estimation methodology detailed.

[7] For example: SWB informed Bureau staff just before the filing date that SWB preferred to change line 191, percentage of total switches equipped with equal access, to show percentage of *local* switches equipped with equal access. Bureau staff advised SWB that this would not be acceptable. In its July 1 filing, SWB has retained the description "percentage of total switches equipped with equal access," but has filed numbers reflecting percentage of local switches equipped with equal access. Contel and Ameritech have filed similar noncomplying data.

[8] This cover letter should note changes made by the LEC to correct typographical and other errors, as well as changes made in response to this Order. A copy of this letter should be provided to the Tariff Division as well as with the filings.

[9] The specifications provide means of indicating that data is withheld or unavailable; any such report must be footnoted and explained.

[10] Contel and GTOC filed "restricted" versions of Table IV.A., the table giving detailed information on all incidents of switch downtime of more than two minutes' duration. In each case, the carrier's restricted version shows a table populated entirely with zeros. GTOC filed a cover letter stating that detailed identification of switches experiencing such downtime would reveal proprietary information.

[11] *See, e.g., LEC Price Cap Order*, 5 FCC Rcd at 6829 (para. 350); *Service Quality Order*, 6 FCC Rcd at 2976 (para. 4).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE HOGAN COMPANY — File No. I-T-C-91-083

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 2, 1991; Released: August 13, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice and data service to the general public by The Hogan Company.[1]

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-083 IS GRANTED and The Hogan Company is authorized to provide international switched voice and data services by the resale of the international switched voice services set forth in US Sprint's Tariff F.C.C. No. 1 and MCI's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that The Hogan Company is limited, under this order, to the provision of international switched voice and data services. Nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] On July 30, 1991, the applicant withdrew its request for waiver of requirements under 47 CFR §§ 1.763(b); 32; 43.61; 63.01(b); and 63.10(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-91-139

For blanket authority pursuant to Sections 503 and 504 of the Inmarsat Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to provide international land mobile satellite service via the Inmarsat System

FURTHER ORDER EXTENDING PLEADING PERIOD

Adopted: August 7, 1991; Released: August 7, 1991

By the Chief, International Facilities Division:

1. In an order released July 8, 1991, DA 91-864, the Commission extended the period for interested parties to file comments in the above-captioned matter until August 7, 1991. American Mobile Satellite Corporation (AMSC) is now requesting a further 30 day extension of time until September 5, 1991 in which to file comments. In support of its request, AMSC states that it is actively engaged in discussions with Comsat to resolve their differences regarding the application. AMSC believes that these discussions may obviate the need for it to file any response to the application or may result in fewer issues being raised before the Commission. AMSC further states that Comsat does not object to the requested extension.

2. Upon consideration of AMSC's request, we find that good cause has been shown for a further extension of time in this matter. Accordingly, the time in which to file comments pertaining to the above-captioned application is hereby extended until September 5, 1991. Opposition and replies to any comments filed shall be filed in accordance with Section 1.45 of the Commission's Rules and Regulations, 47 C.F.R. §1.45.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-536

In re Applications of

Augusta Radio Fellowship Institute d/b/a SOUTH CAROLINA RADIO FELLOWSHIP — File No. BPED-871008MS

For a Construction Permit for a New FM Broadcast Station on Channel 231A at Kingstree, South Carolina

In the Matter of

WILLIAMSBURG COUNTY BROADCASTING CORP.
Licensee of Station WKSP(AM)
Kingstree, South Carolina

Order to Show Cause Why the Licensee for Station WKSP(AM), Kingstree, South Carolina, Should Not Be Revoked

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1991; Released: August 13, 1991

By the Commission:

1. We have before us the exceptions to the Initial Decision in this proceeding, 6 FCC Rcd 340 (ALJ 1991), filed by Williamsburg County Broadcasting Corp. (County) on March 5, 1991. On the basis of findings that Gregory Knop, County's controlling stockholder, had been convicted in a federal court of possessing cocaine with intent to distribute and of conspiring to commit that offense, crimes which are classified as felonies, and had been sentenced to five years' imprisonment; that Knop had deceitfully concealed material information about his arrest and conviction; and that Knop had admittedly lied to a sentencing judge and bribed policemen, Administrative Law Judge Joseph Chachkin concluded in the Initial Decision that County is unqualified to remain a licensee and therefore ordered that its license for WKSP(AM) is to be revoked. *Id.* at 345 ¶¶ 41 and 46, 346 n.8. County takes exception to the findings that Knop deceitfully concealed information and to the conclusion that it is unqualified.[1] As there is no showing in the exceptions warranting a different conclusion, we will affirm the revocation order.

2. A number of the arguments that County raises are irrelevant because they concern matters of which there is no mention in the Initial Decision or findings from which Judge Chachkin drew no material conclusion. We decline to respond to those arguments. We also decline to respond to County's arguments concerning the findings that Knop deliberately concealed material information about his arrest in an application filed with the Commission and that he deliberately failed to report his conviction and related information. It is unnecessary to determine whether the arguments concerning the candor findings are correct, because the ultimate conclusion that Knop and County are unqualified is amply supported in any event by the findings concerning Knop's criminal activities, including the disclosures that he lied to a judge in order to obtain a reduction in the length of his prison sentence and twice bribed law enforcement officials to get advance warning of police raids. We will respond briefly to the exceptions concerning the grounds for decision that we are affirming.

3. County argues at length that Knop's conviction for drug trafficking[2] is irrelevant to its qualification to be a licensee, on the premise that in *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986) (*Character Policy Statement*), the Commission specifically indicated in footnote 35 that a conviction for conspiracy to distribute a controlled substance would have no material bearing on an individual's qualification to be a broadcast licensee. We refuted that premise in the order instituting this proceeding, *Order to Show Cause and Order Requiring Consolidation*, 5 FCC Rcd 3034, 3035 ¶ 15 (1990), and we stand by that holding, which requires no further explanation.

4. County also contends that, although the Commission said in the *Character Policy Statement* that it might consider "egregious" misconduct not involving violation of the Communications Act or FCC rules or policies as *prima facie* evidence of a lack of character traits that are requisite to qualification, *id.* at 1205 n.60, it indicated elsewhere in the policy statement that what it meant by "egregious misconduct" was rare and heinous crimes such as presidential assassination or terrorism. *See id.* at 1192 n.29. This contention is without merit.

5. To be sure, the *Character Policy Statement* does not specifically discuss convictions for drug trafficking as relevant, but the Commission dispelled any doubt in that regard by issuing a public notice, 4 FCC Rcd 753 (1989), in which it declared that it would regard drug trafficking as a matter of the gravest concern and that it would take "all appropriate steps, including initiation of license revocation proceedings, where information comes to our attention that FCC licensees or their principals have been convicted of drug trafficking." County argues that, although the Commission was free to change its policy in this respect, it cannot lawfully apply the new policy retroactively to disqualify someone for violations that occurred before the change. The *Public Notice* did not announce a change of policy, though; it merely clarified that the pre-existing policy of considering egregious non-broadcast misconduct encompassed drug trafficking.

6. The Commission must consider any matter coming to its attention that raises a material doubt as to whether the grant of a broadcast application would serve the public interest, and it may revoke a license for any reason that would warrant denial of an application. *See* 47 U.S.C. §309 and §312(a)(2). The *Character Policy Statement* must be read consistent with this basic policy. [3] As we remarked in the show cause order for this case, a material doubt certainly exists as to whether anyone recently found guilty of drug trafficking, which involves systematic devo-

tion to a criminal enterprise and callous disregard for the welfare of fellow citizens, would well serve the public through exercise of the wide and important discretion that this agency entrusts to licensed broadcasters. 5 FCC Rcd at 3035 ¶ 14. *See* also *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 ¶ 4 (1990), modified, FCC 91-146, rel. May 24, 1991, in which we held that any felony conviction is relevant to character qualifications. Furthermore, we agree with the conclusion reached below that in light of Gregory Knop's criminal activities it would disserve the public interest to permit him to keep his license. In this regard, we note that Gregory Knop is County's controlling owner, that the criminal conduct at issue occurred less than four years ago, and that County made no significant showing of mitigating circumstances or rehabilitation despite the opportunity it had to do so. *See Character Policy Statement*, 102 FCC 2d at 1228 ¶ 105, and *RKO General, Inc. (WAXY - FM)*, 5 FCC Rcd 642, 644 ¶¶ 19-21 (1990). Hence, we affirm the order of revocation. As we explained before, County is in no position to claim any immunity from scrutiny of Knop's criminal record on the pretext that it had no clear advance notice that such matters might be held against it for purposes of licensing. 5 FCC Rcd at 3035 ¶ 16.

7. While the drug conviction is itself sufficient basis for revocation here, the adverse implication of Knop's conviction is reinforced, as the ALJ correctly held, 6 FCC Rcd at 346 n.8, by the finding that he admitted under cross examination that he had twice bribed a law official to obtain advance warning of planned drug raids and passed the information to his partner so that the partner might avoid arrest, *id.* at 341-42 ¶ 15, and by the finding that Knop conceded in his testimony that he had deliberately misrepresented a fact in a petition to a judge in order to persuade the judge to reduce his prison sentence. *Id.* at 341 ¶¶ 12-13. County asserts that the latter admission is irrelevant to the specified hearing issues and that the former is immaterial because it concerns behavior that is "clearly secondary and happened no more than twice." We disagree. Both matters obviously have a material bearing on Knop's propensity to be candid in communications with the Commission and to obey its rules and policies. *See Character Policy Statement*, 102 FCC 2d at 1196-97 ¶ 37 and 1205 n.60. Moreover, the findings in question are based on Knop's own admissions and are therefore undisputed and they concern circumstances related to the felony conviction. Hence, there can be no valid objection to our taking notice of them.

8. ACCORDINGLY, IT IS ORDERED that the exceptions filed March 5, 1991 by Williamsburg County Broacasting Corp. to the Initial Decision in this proceeding ARE DENIED, and the order revoking the license of Williamsburg County Broadcasting Corp. for Station WKSP(AM), Kingstree, South Carolina IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In light of the gravity of the findings and the sanction ordered below and also in light of the fact that Knop filed the exceptions *pro se*, we have undertaken review of County's exceptions despite the fact that he filed them late without good cause and misdirected them to the Review Board.

[2] County asserts that Knop was merely convicted of "the inchoate crime of conspiracy," not drug trafficking, and therefore maintains that it is incorrect to say that he was a drug trafficker. This quibble is belied by findings that County does not even mention, let alone refute with citations to the record. According to these uncontroverted findings, Knop admitted in his hearing testimony that he had trafficked in cocaine in a joint business venture for eight or nine months prior to his arrest. 6 FCC Rcd at 341-42 ¶¶ 15-18. Further, the findings indicate that he pled guilty not only to conspiracy but also to violating a provision of the federal criminal code that prohibits the possession of a "controlled substance" with intent to manufacture, distribute, or dispense it. *Id.* at 341 ¶ 10.

[3] Policy statements are, of course, non-binding and simply set forth a tentative statement of the agency's views. *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Co.*, 589 F.2d 658, 666 (D.C. Cir. 1978). Moreover, even assuming, *arguendo*, that the Commission's concern with felony drug trafficking convictions represents a change in policy, that new policy should apply in this case, especially in light of the fact that there is no claim of detrimental reliance on any prior policy. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 673 n.31 (1972) (the property of regulated industries is held subject to such limitations as may reasonably be imposed on it in the public interest and the courts have frequently recognized that pre-existing interests may be abolished or modified based on such a public interest determination).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
SATELLITE BUSINESS SYSTEMS, and
WESTERN UNION INTERNATIONAL, INC.,
Complainants,

v. File No. E-90-425

NEVADA BELL, INC.,
Defendant.

ORDER

Adopted: August 6, 1991; Released: August 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1990, MCI Telecommunications Corporation, Satellite Business Systems and Western Union International, Inc. (hereinafter the "Complainants") filed the above-captioned formal complaint against Nevada Bell, Inc. (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On July 30, 1991, however, Complainants and Defendant filed a joint motion to dismiss the complaint with prejudice stating that the parties had disposed of all issues and controversies in the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Complainants' and Defendant's Joint Motion to Dismiss IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION, SATELLITE BUSINESS SYSTEMS, and WESTERN UNION INTERNATIONAL, INC., Complainants,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, and — File No. E-90-426

SOUTH CENTRAL BELL TELEPHONE COMPANY, Defendants. — File No. E-90-427

ORDER

Adopted: August 6, 1991; Released: August 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1990, MCI Telecommunications Corporation, Satellite Business Systems and Western Union International, Inc. (hereinafter the "Complainants") filed the above-captioned formal complaints against Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On July 30, 1991, however, Complainants and Defendants filed a joint motion to dismiss the complaints with prejudice stating that the parties had disposed of all issues and controversies in the complaints.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Complainants' and Defendants' Joint Motion to Dismiss IS GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-33

In the Matter of

Petitions for Rule Making
Concerning Proposed Changes
to the Commission's Cellular
Resale Policies

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 1991; Released: August 13, 1991

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 27, 1991, the Commission released the above-referenced *Notice of Proposed Rule Making and Order*, 6 FCC Rcd 1719 (1991) (*Cellular Resale NPRM/Order*), which seeks comment on whether the Commission should require a facilities-based carrier to provide resale capacity to its facilities-based competitor in the same market.[1] The *Cellular Resale NPRM/Order* also clarified the requirement that resale capacity be provided on a non-discriminatory basis.

2. On May 24, 1991, Cellnet Communications, Inc. (Cellnet), a reseller of cellular services in the Detroit-Ann Arbor Michigan area, filed with the U.S. Court of Appeals for the District of Columbia a Petition for Review of the Commission's decision in the above-referenced proceeding insofar as it seeks to clarify the non-discrimination requirement of the Commission's cellular resale policy. Concurrent with its filing before the court, Cellnet filed a Motion for Stay of Clarification (Motion), requesting a stay of the clarification of the Commission's cellular resale policy in the *Cellular Resale NPRM/Order* pending judicial review. For the reasons discussed below, we deny Cellnet's Motion.

II. DISCUSSION

3. In support of its Motion, Cellnet claims that it has a substantial chance of prevailing on the merits of its appeal. Cellnet avers that the Commission's clarification of the resale policy in *Cellular Resale NPRM/Order* involved a rule change in violation of the Administrative Procedure Act. According to Cellnet, when the Commission clarified the obligation that resale capacity be provided on a non-discriminatory basis, the Commission ignored its earlier decision in *Cellular Communications Systems*, 86 FCC 2d 469, 511 (1981) (*Cellular Systems), modified*, 89 FCC 2d 58 (1982) (*Reconsideration Order), further modified*, 90 FCC 2d 571 (1982) (*Further Reconsideration Order), appeal dismissed sub nom. U.S. v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983). Cellnet maintains that the Commission, in *Cellular Systems*, established the requirement that Bell Operating Company (BOC) affiliates maintain separate wholesale and retail divisions and that they offer resale capacity to resellers at wholesale rates. Cellnet also contends that the Commission's clarification of the resale policy in *Cellular Resale NPRM/Order* ignores its decisions in *Cellular CPE*, 57 RR 2d 989 (1985), and *James F. Rill, Trustee*, 60 RR 2d 583 (1986), which restate the wholesale/retail requirement established in *Cellular Systems*. Cellnet concludes that the Commission's departure from its cellular resale policy established in *Cellular Systems* and articulated in subsequent case precedent is unlawful.

4. Cellnet also claims that it will suffer irreparable harm unless the stay is issued. It argues that allowing BOC-affiliated licensees to eliminate their wholesale offerings to resellers will further erode the already poor economic condition of resellers. On the other hand, Cellnet maintains, a stay would not harm resellers and BOC-affiliated cellular licensees. Finally, Cellnet argues that grant of a stay would serve the public interest by preserving competition in cellular markets that occurs from BOC-affiliated carriers offering resellers "wholesale" rates.

5. To qualify for a stay, Cellnet must show that (1) it is likely to prevail on the merits; (2) it will be irreparably harmed unless a stay is issued; (3) issuance of the stay will not cause substantial harm to any other party; and (4) the public interest is best served by issuing a stay. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Jobbers*). *See also, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (*WMATA*).

6. Cellnet has failed to demonstrate that resellers will suffer irreparable injury if the *Cellular Resale NPRM/Order* not stayed. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 764 (D.C. Cir. 1985). Even if the *Cellular Resale NPRM/Order* eliminated the requirement that BOC-affiliates establish a wholesale/retail rate structure, which Cellnet contends was established in *Cellular Systems*, Cellnet has failed to provide any evidence demonstrating that the Commission's clarification of the cellular resale requirement will result in severe economic injury to resellers. *See WMATA*. Finally, granting the Motion would harm the public interest because cellular licensees engaged in discriminatory practices against resellers arguably could continue those practices, in contravention of the intentions clarified in the *Cellular Resale NPRM/Order*.[2]

7. We cannot conclude on the evidence or arguments before us that Cellnet has met its burden under *Virginia Jobbers* and *WMATA*. Therefore, we deny its Motion.

III. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED THAT the Motion for Stay of Clarification filed by Cellnet Communications Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Comments in this proceeding were due on May 20, 1991 and reply comments were due on June 4, 1991. The deadline for filing reply comments was subsequently extended to June 19, 1991.

[2] For example, in the *Cellular Resale NPRM/Order*, at 1725, the Commission indicated that facilities-based carriers' practices of offering preferred customers bulk rates that are lower than wholesale rates appears discriminatory.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Application of

NANCY NALESZKIEWICZ — File No. 10494-CL-P-430-A-89

For a construction permit to establish a new celluar system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve the Kansas - 3 (Jewell) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1991; Released: August 16, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it the Appeal, filed July 3, 1991, by Nancy Naleszkiewicz (Appellant) from Administrative Law Judge Edward J. Kuhlmann's *Memorandum Opinion and Order*, FCC 91M-1790, released June 4, 1991 dismissing with prejudice the above-captioned application. Opposition pleadings were filed on July 15, 1991 by the Commission's Common Carrier Bureau and on July 18, 1991 by the two other parties to this proceeding, Pacific Nationwide Cellular (PNC) and The Committee for a Fair Lottery (CFL). A Reply to the opposition pleadings was filed by the appellant on July 29, 1991.

GENERAL BACKGROUND

2. This proceeding, *sui generis* in many respects, was designated for hearing to determine whether appellant, a winning cellular radio/telephone lottery applicant, "possesses the requisite qualifications to be a Commission licensee and whether a grant of her application would be in the public interest." *Hearing Designation Order*, 5 FCC Rcd 7131, 7138 (1990)(" *HDO* "). The underlying misrepresentation/lack of candor questions stem from the activities of Genesis Enterprises, Ltd., of which appellant and her husband (Wladimir Naleszkiewicz) are the sole owners and officers, and which activities led to 1989 federal indictment of Genesis (and the husband) on charges of mail fraud (18 U.S.C. § 1341) and false statements (18 U.S.C. § 1001) in connection with more than one thousand FCC cellular lottery applications promoted by Genesis. *HDO*, 5 FCC Rcd at 7132. In essence, the indictment charged that appellant and her husband criminally operated Genesis, just one of many FCC cellular lottery "application mills," by collecting several hundred thousand dollars from so-called lottery "investors," diverting such monies for private purposes, and, *inter alia*, failing thereafter to file many hundreds of cellular radio applications with the FCC on behalf of these lottery "investors."[1]

3. On February 8, 1990, Genesis opted (partially) for exodus. Pursuant to a plea bargain, appellant's husband would plead guilty to two counts of mail fraud; further, appellant, her husband (and both together d/b/a Genesis Enterprises) would agree to make restitution of more than $500,000 to the allegedly defrauded "investors" out of the proceeds of the immediate sale of this instant cellular radio construction permit, which appellant had "won" as the result of a lottery application submitted in her own personal name. *HDO*, 5 FCC Rcd at 7133. Although appellant signed both the plea agreement and the Statement of Facts making out the federal criminal charges, she has nonetheless asserted in connection with her instant FCC application that she had neither involvement in, nor personal knowledge of, the crimes charged against Genesis, but acquiesced in the plea bargain solely in order to allow her husband a "negotiated settlement" of the numerous outstanding criminal charges.[2]

4. But based upon the facts as known (or alleged in connection with the indictment), the Commission refused to accept appellant's unsupported claims of personal innocence as to the serious crimes charged. It therefore designated her instant cellular radio application for a full evidentiary hearing to determine the complete facts surrounding appellant's involvement in, or knowledge of, the activities of Genesis; and, in turn, to decide whether appellant has misrepresented facts to (or lacked candor with) this Commission, therefore failing to possess "the requisite qualifications to be a Commission licensee." *HDO*, 5 FCC Rcd at 7138.

PREHEARING MATTERS

5. The *HDO* was both publicly released on November 26, 1990 and mailed personally to appellant.[3] Appellant has never denied timely receipt of the *HDO*, which among other things expressly provided that: "The applicant and the parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's rules within 20 days of the mailing of this order by the Secretary." *HDO*, 5 FCC Rcd at 7138 (para. 62). Accordingly, appellant was first required by rule to simply advise the Commission within 20 days, by Notice of Appearance, that she wished to, and would in fact, participate in the designated hearing on her application or face dismissal for failure to prosecute. No such notice was filed by either appellant or by any attorney acting in her behalf. *See MO & O*, paras. 3-5.

6. Rather, 45 days late and (*id.*, at para. 3):

> On January 30, 1991, [appellant] moved to have a late appearance accepted. She represented that her law firm, Sullivan & Worcester, told her it would not represent her, she always intended to appear, she was "unaware" that the Rules required her to notify the Commission that she would appear, she was preoccupied with her spouse's sentencing on January 18, 1991, in a related criminal case and she retained her counsel, Sheldon Schuman, apparently after William Fishman at Sullivan & Worcester said he would not represent her.

Over the vigorous objections of the two other parties herein, but with the support of the Commission's Common Carrier Bureau, the presiding ALJ reluctantly permitted appellant's late appearance, notwithstanding his express finding that appellant's request to accept her late appearance [4]:

> is unsupported by a good cause showing, but because [appellant] attended the prehearing and her late filing did not disrupt the Commission's processes, the late notice will be accepted.

7. Having formally ruled so on March 21, 1991 to permit appellant's late appearance, and for the parties to continue their discovery, the ALJ was shortly thereafter beset by numerous motions, the most pertinent here culminating in a Joint Motion to Dismiss the Application or In the Alternative to Enlarge Issues, filed May 8, 1991 (Joint Motion) by opposing parties PNC and CFL. There:

> PNC move[d] to dismiss [appellant] because she failed to answer interrogatory 1 when compelled to do so. CFL and PNC jointly move to dismiss [appellant] or enlarge issues against her because she filed her notice of appearance late and she misrepresented the reasons for her late action. The Common Carrier Bureau supports granting the CFL and PNC joint motion to dismiss.

MO & O at para. 2.

DISMISSAL

8. In the subject *MO & O*, the ALJ granted the above Joint Motion to Dismiss on two grounds: *First*, he found from the documentary evidence adduced during discovery that appellant had been sharply untruthful about the basis for her late appearance on January 30. As evidence of her prior dishonesty, the ALJ had before him a letter of December 7, 1990 from William Fishman, Esq., of the firm of Sullivan & Worcester. Fishman's letter advised the appellant that, because of conflicts with other cellular clients, his firm would not be available to represent her in this particular proceeding, but would be "available, on a limited and background basis, to assist the counsel you have retained to represent you in this matter . . . ." In fact, Fishman's December 7 letter actually opened as follows:

> Dear Nancy:
>
> Enclosed you will find an Order, FCC 90M-3769, establishing dates for a prehearing conference and the hearing in connection with your Kansas-3 (Jewell) RSA application. An FCC Staff Notice of Appearance is also enclosed. Your counsel should file a Notice of Appearance at the FCC as provided in Para. 62 of the Hearing Designation Order.

A copy of Fishman's December 7 letter to appellant was concurrently sent by Fishman (*with enclosures)* to Sheldon Schuman, Esq. of the firm of Schuman, Kane, Felts & Everngam. Joint Motion, Attachment 3.

9. Also before the ALJ was a letter appellant herself had written to Sheldon Schuman on January 3, 1991, which letter in pertinent part stated:

> Re: The hearing before the FCC Administrative Law Judge for a Construction Permit for Kansas-3-Jewell RSA
>
> Dear Shelly:
>
> As you know, the FCC has designated the issuance of a Construction Permit for my win of Kansas 3 RSA for a hearing before the Administrative Law Judge Edward J. Kuhlmann--see the attached FCC order.
>
> Also, as you know, Bill Fishman, of Sullivan & Worcester, who has been handling my representation at the FCC until now, cannot represent me in that hearing due to a potential conflict of interest. (*See* attached letter).
>
> I would like to ask you to represent me during the FCC administrative proceedings. You have an enormous advantage not only because Genesis has been your client for five years now and also because you are thoroughly familiar with the case at hand.

See Opposition to Joint Motion, filed May 13, 1991, Exh. C.[5] That same January 3 letter from appellant, in her own words, (1) advised Schuman that "I need a counsel to formally notify the Commission of his intention to appear in my behalf in the above proceeding"; and (2) "enclos[ed] a copy of the FCC Rules and Procedures, Part I concerning Practice and Procedure," including of course the precise rule regarding Notices of Appearance within 20 day of any hearing designation. *See* 47 CFR § 1.221.

10. The record before the ALJ by that time also contained the January 9, 1990 letter of Sheldon Schuman, who, under his firm's letterhead, had written to appellant's Genesis clients to reassure them of their prospects before the FCC. *See* PNC Second Motion To Enlarge Issues, filed May 9, 1991, Attachment 2. That letter, with the saluation "Dear Clients," began: "Please be advised that the undersigned is the General Counsel for the Genesis Enterprises, Ltd." [6] Nowhere in its pleadings to the ALJ in opposition to the Joint Motion to Dismiss did appellant (1) deny knowledge, or timely receipt, of the *HDO* itself or of the December 7, 1990 letter from William Fishman; (2) deny the dispatch of her own letter of January 3, 1991 to Sheldon Schuman notifying him that she needed an attorney "to formally notify the Commission of his intention to appear in my behalf" in this instant proceeding; (3) deny that Schuman had been retained before by Genesis, and was undoubtedly aware before January 30, 1991 of the need to file an appearance in this instant case.[7] Instead, in opposition to the Joint Motion, appellant asserted to the ALJ that "[a]t no time did the appellant understand that it was necessary for her to file a timely notice of appearance,"[8] that she did not comprehend that requirement from either the *HDO* itself, the William Fishman (December 7, 1991) letter to her, or Part 1 of the Rules,[9] and that her letter of January 3, 1991 to Sheldon Schuman, clearly evincing a contemporaneous

knowledge of her need for a formal appearance in this case, was merely "an attempt to retain him without payment of any money," [10] money she did not possess until much later that month (*see supra* note 5).

11. *Second*, the ALJ based his dismissal on appellant's failure to (timely) answer a primary interrogatory to:

> Provide a list of witnesses you contemplate utilizing during the hearing, including mailing addresses, include a brief statement as to the nature of the testimony to be provided, and indicate which witnesses you will seek to qualify as expert.

When appellant failed to answer, PNC filed a Motion to Compel on February 26, 1991. In a Response to that PNC motion, filed on March 4, 1991, appellant argued that the interrogatory "was answered in full . . . [appellant] is not required to provide a brief description of the nature of the testimony," *id.*, at 1-2, although appellant had never before objected to that basic interrogatory. On March 21, 1991, the ALJ ordered appellant to "submit a complete answer to interrogatory one." *Memorandum Opinion and Order*, FCC 91M-1025. One week later, appellant supplied Supplemental Answers To Interrogatories, in which she again failed to answer the interrogatory. This second failure prompted PNC to file a Motion to Dismiss on April 11, 1991, on the ground that appellant had ignored the ALJ's order of March 21 to submit a complete answer. In an Opposition to that PNC motion, filed on April 18, appellant alleged that it had "inadvertently overlooked the fact that Interrogatory No. 1 had not been answered in full," and it advised the ALJ that it had since supplied the missing information. In considering appellant's actions anent the interrogatory as an additional reason for his ultimate dismissal, the ALJ rejected her assertion that her failure had been inadvertent, and he considered this -- along with her conduct concerning her earlier late appearance -- to be reflective of appellant's contumely for the Commission's hearing rules and processes. *See MO & O*, para. 13.

APPEAL

12. Before the Board, appellant makes several arguments to attack her dismissal. Initially, and as a substantive matter, appellant continues to insist that she had no knowledge whatever that a formal Notice of Appearance was required prior to the January 30, 1991 prehearing conference. [11] Thus, citing *Folkways Broadcasting, Inc.*, 33 FCC 2d 813 (Rev. Bd. 1972), appellant argues that, at most, the documentary evidence on which the ALJ relied heavily for dismissal gave rise to a fresh hearing issue, and that appellant was entitled to a full evidentiary hearing on that fresh issue before the ALJ could properly conclude that appellant had dissembled as to the reasons for late appearance.[12]

13. As a more technical matter, appellant maintains that it was plain error for the ALJ to even reopen the matter of her late appearance and, retroactively, find that she lacked "good cause" for her prior failure when, in fact, he had already known, nay specifically found, that she had lacked "good cause" at the time, yet permitted her late appearance anyway because (apparently at that time) no disruption would thereby occur (*see supra* para. 6). Appellant contends, in essence, that if her late appearance caused no "disruption" of the proceedings on January 30, it could not be cited as a disrupting factor militating toward a dismissal four months later in the *MO & O*.

14. Consequently, claims appellant, inasmuch as the *MO & O* acknowledged that her failure to (timely) comply with the first interrogatory would not have ordinarily constituted an independent ground for dismissal, it was improper to conjoin her "nondisruptive" late appearance with her equally "nondisruptive" discovery failure to conclude that, in the ALJ's words, appellant "has often ignored the rules" and must be dismissed as unreliable. *See MO & O*, para. 13.

DISCUSSION

15. In *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), *appeal dismissed sub nom Punta Ybel Communications, Ltd v. FCC*, No. 86-1670 (D.C. Cir. Feb. 29, 1988), the Commission announced a slight policy shift toward affording its ALJs more discretion in superintending proceedings so as to promote the expeditious resolution of agency hearings and, hence, the start-up of new communications services, including the discretion to dismiss an applicant that disdains regnant rules and procedures governing the conduct of the licensing hearing itself. Though *Hillebrand* was a multiparty comparative broadcast case, the Commission's policy language seems as pertinent here. It explained:

> For some time now there has been a growing interest in new and expanded communications services, as reflected in an increasing number of applications, and, more importantly, a demonstrated public demand for such services. Hence, we have placed a greater emphasis on our responsibility to provide service to the public in the most efficient, expeditious manner possible and on the fact that delaying the initiation of new service disserves the public interest.

1 FCC Rcd at 419. The Communications Act explicitly empowers the Commission to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice," 47 U.S.C. § 154(j), and it has delegated to its presiding ALJs a "broad discretion" to dismiss an applicant showing contempt for its rules and the hearing process. *Hillebrand, supra* ; *see generally also Lorraine Walker Arms*, 5 FCC Rcd 7013 (1990)(contemptuous applicant may be punished for "abuse of the system"; ALJ dismissal upheld); *accord, Carmel Broadcasting Limited Partnership*, 91R-66, released July 31, 1991 (Rev. Bd.).

16. But as the court has reminded, and as with the exercise of any administrative discretion, the exercise must not abuse that discretion or be arbitrary or capricious. *Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988). While *Comuni - Centre*, like *Hillebrand*, was a comparative broadcast case, and the court there affirmed the dismissal of a license applicant, Judge Robinson also provided some considerations that we believe have larger applicability in reviewing the dismissal of any FCC license applicant, to wit:

> In reviewing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

856 F.2d at 1554. In reviewing ALJ dismissals, which are immediately appealable to the Board "as a matter of right," 47 CFR § 1.301(a)(1), we have have endeavored to apply the *Comuni - Centre* guidelines. *Compare, e.g., Carmel Broadcasting Limited Partnership, supra* (dismissal affirmed) *with The Dunlin Group*, FCC 91R-69, released August 2, 1991 (dismissal reversed).

17. The artfully crafted appeal before us makes several arguments that are quite seductive, at least at the level of gestalt. Thus, appellant is technically accurate that the subject *MO & O* does reach back to find a lack of "good cause" for her initial late appearance, when the ALJ had previously permitted her appearance despite her having failed to demonstrate, in the strictest legal sense, the requisite "good cause" at that time. Appellant is likewise correct that, in the main, an applicant is afforded an opportunity to refute a perception of untruthfulness in a full evidentiary hearing. Indeed, as the *HDO* explains, this entire cellular licensing proceeding centers on a specifically designated hearing issue to determine whether appellant has been truthful with this Commission in her claim of absolute ignorance of the alleged misdeeds of her husband and her company, Genesis Enterprises. And, a specifically designated misrepresentation issue is conventionally heard before an applicant can be "disqualified," in the formal sense, for licenseeship. *See West Coast Media, Inc. v. FCC*, 695 F.2d 128 (D.C. Cir. 1982). Finally, we cannot disagree with appellant that a failure to timely comply with a single interrogatory is not, in and of itself, a strong basis for dismissal, a point the ALJ himself acknowledged in his subject *MO & O*. At first blush, therefore, it might seem more appropriate to honor appellant's suggestion that, at most, we remand this case to the ALJ for a hearing on a fresh, additional issue encompassing her late appearance, there to test the candor of her prehearing representations.

18. Upon closer scrutiny, however, certain of appellant's plaints are merely artful, not persuasive. It is correct that, in a technical sense and certainly as a literal fact, the ALJ assayed (based on new evidence) to have rescinded a "good cause" finding for her late appearance, a finding he had eschewed when declining to dismiss her application at the outset. But literalness aside, it is beyond argument from both the substance and tenor of the *MO & O* that the ALJ actually dismissed appellant for her perceived contempt when justifying her late appearance, in the face of new and demonstrative evidence not before him when he previously held that her late appearance would not "disrupt" this cellular licensing proceeding. When, on the other hand, the new evidence was adduced and the opposing parties filed their Joint Motion, the ALJ had but two realistic choices: (1) cease the focus of the hearing from the substantive issue(s) designated in the *HDO* concerning appellant's complicity in the affairs of Genesis Enterprises, and shift instead to a preliminary and a wholly tangent issue to determine whether she had lacked candor in justifying her *very* appearance at the hearing on the extant issue(s); or (2) dismiss her application for an intolerable disruption of the intended hearing on the substantive issue(s) actually ordered in the *HDO*.

19. Given the general proposition that a discrete issue is ordinarily declared before an applicant is found "unqualified" as a result of a misrepresentation to (or a lack of candor with) the Commission, *West Coast Media, supra*,[13] and the Board's own firm (if not rigid) appreciation of that general proposition, *see, e.g., Silver Star Communications - Albany, Inc.*, 3 FCC Rcd 6342, 6349-50 (Rev. Bd. 1988) (disqualification on misrepresentation not upheld where discrete hearing issue not added), the safe bet here, it would seem, would be to overturn the dismissal and return this proceeding to hearing to try a fresh, preliminary issue to determine whether appellant was untruthful on the very doorstep of the hearing, and was therefore unfit for licenseeship based on that threshold conduct. But the "safe bet," and what the law and the public interest truly mandate, are not necessarily coextensive, and the situation before us compels a clearer, more thorough analysis.

20. That analysis must proceed from the recognition that what in substance is actually before the Board, appellant's fine linear dissection of *HDO* notwithstanding, is the summary dismissal of the applicant for conduct found by the ALJ to be contemptuous and disruptive, not a "disqualification" on a designated issue. While the ALJ himself did not explicate his reasons precisely in those terms, it is inarguable that, taken as a whole and in meaningful context, the ALJ: (1) found shocking and appalling the new evidence that, contrary to her earlier representations, appellant did have legal advice available at the time she received the *HDO*, and that one lawyer (at least) expressly and directly advised her of her obligation to file a formal appearance (even sending to her the proper FCC form); and (2) found incrementally telling appellant's conduct over the very first interrogatory, where she blithely blamed her failure to provide opposing counsel with the most fundamental hearing information on "inadvertence," when in fact, though without formally objecting in the slightest to that interrogatory, appellant repeatedly disputed the right of the other parties to that basic data, and she declined to provide the data until after a dismissal motion was filed. Viewed from the standpoint of the ALJ, who had leniently bent the rules to let the appellant even appear and participate, this prehearing conduct surely did not auger the expeditious resolution of the critical issue(s) set out by the Commission in the *HDO*. Rather, he perceived that conduct, taken together, to evince an attitude of scorn toward her obligation to adhere to Commission rules and procedures. In short, he found her actions to be openly contemptuous.

21. Among the various delegations of agency authority to the ALJ is the traditional authority of a presiding judge to:

> Regulate the course of the hearing . . . and exclude from the hearing any person engaging in contemptuous conduct or otherwise disrupting the proceedings.

47 CFR § 1.243(f). It is, we think, highly instructive and apposite that in confronting a situation where this Commission took terminal action (denied renewal of a $450 million Boston TV station) based on a perceived lack of

applicant candor, *though it had neither added nor tried a discrete candor issue*, the court nevertheless affirmed by drawing a cogent analogy to the bedrock authority of a tribunal to summarily punish for conduct that takes place "before the judge's own eyes" or "in the face of the court," *RKO General, Inc. v. FCC*, 670 F.2d 215, 234 (D.C. Cir. 1981), conduct in other words that amounts to contempt. Moreover, while the court there fully recognized and expounded the "general proposition" that formal notice and a hearing must ordinarily precede punishment, and it recognized also that allowable deviations would be "rare," it affirmed the agency because the evidence on which the Commision took summary action against the applicant could not be plausibly denied.[14]

22. We too have closely reviewed the documentary evidence that emerged from discovery, compared that evidence to appellant's pleading representations when she sought to enter a much-belated Notice of Appearance, [15] and we cannot conclude that the ALJ erred in finding, at least, a lack of complete candor so evident that "summary vindication of the [Commission's] dignity and authority is necessary" to punish appellant's perceived effrontery. *RKO General*, 670 F.2d at 234 (quoting *Cooke v. U. S.*, 267 U.S. 517, 534 (1925)); *see also Bell v. Wolfish*, 441 U.S. 520, 536 n.17 (1979)(cited in *RKO General*).

23. Once again, the ALJ had before him: (1) the Sullivan & Worchester letter of December 7, 1990, in which William Fishman pointedly adverted to para. 62 of the *HDO*, enclosed the *HDO* along with an FCC Notice of Appearance form, and specifically advised appellant to file that FCC form "as provided in Para. 62 of the Hearing Designation Order"; and (2) appellant's own letter of January 3, 1991 to Sheldon Schuman, a copy recipient of that same Sullivan & Worchester letter, in which appellant herself specifically advised Schuman that "I need a counsel who has to formally notify the Commission of his intent to appear on my behalf" in this proceeding, appellant even going so far as to provide Schuman with Part I of the FCC Rules. Again, appellant has never denied receiving the *HDO* or reading Fishman's prompt to para. 62 thereof. Without such knowledge, it defies credulity that appellant herself could advise Schuman of her need for a Notice of Appearance, particularly when *she* sent *him* a copy of Part I of the rules at the same time. On that evidence alone, [16] we think the ALJ could reasonably infer that appellant's prior representation that she "was not an attorney" and was therefore unaware (until her last-minute retention of Schuman) of the need to timely file a Notice of Appearance was without candor, and so blatent as to constitute contempt warranting summary action.[17] This, undeniably, is the true burden of the subject *MO & O*.

24. We further believe that the ALJ could consider appellant's conduct to thus be inexcusably disruptive of the proceeding actually anticipated by the Commission in the *HDO*. Appellant is the "winning" cellular lottery applicant in this market; and that market is entitled, so far as the Commission is able to provide, to the expeditious appointment of a cellular licensee, even as a competitive alternative to the monopoly wireline carrier. [18] It is one thing when the "winning" cellular applicant must face a hearing to be tested *first* on its basic honesty, as was plainly necessitated by appellant's connection to Gensis. The test of that prior conduct at Genesis was the singular purpose of the instant Commission licensing proceeding. It is another thing altogether to add a fresh issue into an ongoing hearing, thereby delaying resolution of the serious issue(s) actually designated for hearing. *Cf. Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 142 (Rev. Bd. 1970) (need to add a new issue one of the six criteria used in deciding whether to accept an application amendment, even a *basic qualifying* amendment). We do not cite *O' Conner* in the abstract, for (as we have said) the only real choice once the ALJ became privy to the new evidence was to either dismiss the applicant for perceived contemptuous conduct, or (as appellant would have it) forego the hearing issues already designated to reach a completely different truthfulness issue, an issue that does not even touch upon her questionable conduct at Genesis.[19] This additional disruption would have placed new cellular service in the market yet *another* administrative step removed, and it is this "disruption" that the ALJ, the Common Carrier Bureau and the two other parties all remonstrated against.

25. In light of all of the foregoing, and in comprehensive context, we cannot say that the dismissal was in error. By the tenets of *Comuni - Centre*, appellant appears to fail on all four consideration standards: *first*, albeit retrospectively, appellant's "proffered justification for the failure to comply" with the appearance rule was found to be utterly fallacious by the ALJ; *second*, the other designated parties were prejudiced by appellant's failure to signify that she would even *appear*, thus affording them little option but to prepare for a hearing that might not even occur, as well as thereafter having to face new litigation over both her late appearance excuse *and* her truculence over the very first interrogatory; *third*, the burden placed on the system by appellant's prehearing conduct is, we daresay, considerably beyond that envisaged by the *HDO* ; and, *fourth*, "the need to punish abuse of the system and to deter future misconduct" seemed manifest on facts before the ALJ. Whereas the Board is acutely aware of the summary nature of dismissal and of the safety, from the aspect of any further appellate review, that might be afforded by a full evidentiary remand hearing record on appellant's postdesignation conduct, we agree with the Common Carrier Bureau and do not go so far as to hold that the ALJ abused his discretion by electing to dismiss appellant on the totality of the very "rare" facts and circumstances before him.

26. ACCORDINGLY, IT IS ORDERED, That the Appeal filed July 3, 1991, by Nancy Naleszkiewicz IS DENIED, and her application (File No. 10494-CL-P-A-89) IS DISMISSED in this proceeding.

27. IT IS FURTHER ORDERED, That the Request for Oral Argument, filed July 30, 1991, by Nancy Naleszkiewicz IS DENIED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] More specifically, the indictment alleged that Genesis failed to file on behalf of 40 (or more) "investors" 1400 (or more) cellular lottery applications because, after diverting their "investments" for the personal use of the Genesis principals, Genesis lacked even the $290,000 (approximately) necessary for FCC filing fees. Despite its failure to file the cellular lottery applications, Genesis, "operating through" appellant, sent "lulling letters" to a number of "investors" assuring that the applications had been filed with the FCC. *HDO*, 5 FCC Rcd at 7132.

[2] Actually, one other salient facet of the plea agreement provides that, should appellant and her husband perform as provided therein, appellant *herself* would not be prosecuted for criminal wrongdoing. *HDO*, 5 FCC Rcd at 7133.

[3] The *HDO* was followed by an order of the Commission's Chief Administrative Law Judge, Joseph Stirmer appointing Edward J. Kuhlmann as the presiding ALJ, and specifying January 30, 1991 and March 1, 1991 as, respectively, the initial prehearing and hearing dates. *Order*, FCC 90M-3769, released November 30, 1990.

[4] *Memorandum Opinion and Order*, FCC 91M-1025, released March 21, 1991. In urging acceptance of appellant's late appearance, the Commission's Common Carrier Bureau declared:

> Although the motion to accept the notice of appearance is not terribly convincing to the extent that it seeks to explain why the notice had not been filed on a timely basis, we do not oppose acceptance. We think that acceptance of the notice is appropriate because no one has been prejudiced by [appellant's] failure to file on a timely basis. This is not a comparative hearing where competing applicants acted to their detriment based on the mistaken assumption that Naleszkiewicz did not intend to prosecute her application. In fact, counsel for Naleszkiewicz appeared at the initial pre-hearing conference on January 30 and no procedural dates or discovery schedules were impacted by the late appearance.

Bureau Comments, filed February 6, 1991, at 1-2.

[5] It was not until January 24, 1991 that appellant, via Federal Express letter, wrote to Sheldon Schuman as follows:

> Dear Shelly:
>
> Please find enclosed my personal check for $3,000.00 (Three thousand dollars) dated January 29, 1991, as a retainer to represent me before the FCC Administrative Law Judge for a Construction Permit for Kansas-3-Jewell RSA.
>
> Should we meet and discuss anything before the prehearing conference that will be held on January 30, 1991.

Opposition to Joint Motion, *supra*, Exh. B.

[6] The text of Sheldon Schuman's January 9, 1990 letter to Genesis clients was quite upbeat, and went on, in part, to state:

> My client advises me that it is still in the process of seeking reinstatement of your applications at the Federal Communications Commission ("FCC"). In connection with this endeavor, Genesis has retained the law firm of Golden, Freda & Schraub, P.C., specifically David A. Irwin, of that firm, who is an experienced communications attorney.
>
> * * *
>
> Genesis also advises me that it is also in the process of computing amounts of monies paid to the Company by the affected client. Since there are numerous applications, it is taking Genesis considerable time to complete this process. Presently, 18 client's accounts have been computed. Genesis hopes to complete this task in very near future.
>
> Genesis is doing everything possible to protect your interest before the FCC.
>
> Very truly yours,
>
> SHELDON P. SCHUMAN
>
> General Counsel

Appellant's January 3, 1991 letter to Sheldon Schuman was almost equally upbeat, stating (in part):

> At present our cash flow situation both at the Company and personally is rather limited, even though our business prospects are quite bright over the next 30 to 90 days with the imminent third round of FCC cellular lotteries for unserved areas to be announced soon. We have a number of customers who expressed great interest in filing such applications through us. We also are filing some other applications for different other services at the FCC.

If appellant was preoccupied with her husband's criminal case during this period, as she told the ALJ as an excuse for her late appearance, her letter to Schuman gives little evidence of such distraction at the time.

[7] In fact, Sheldon Schuman's January 9, 1990 letter to clients advised that Genesis had also retained David A. Irwin (then with the firm of Golden, Freda & Schraub, P.C., *see* note 6, above); we further note that Irwin (now with the firm of Hopkins & Sutter) represents appellant in her instant appeal. And, Irwin had much earlier appeared (on behalf of Genesis), starting in December 1989, in the very matter which, in part, led to appellant's own designation for hearing in the first instance. *See* PNC Opposition To Appeal, *supra*, at 10 & n.14 (Irwin listed as Genesis counsel in three December 1989 "emergency" pleadings).

[8] Appellant's Opposition to Joint Motion, filed May 13, 1991, at 2.

[9] *Id.*, at 1-2.

[10] *Id.*, at 3.

[11] *See* Appellant's Motion To Enter Appearance Late, filed January 30, 1991.

[12] *See* Appeal at 17-20.

[13] *But cf. WCVQ, Inc.*, 5 FCC Rcd 3824, 3825 (1990)("truthfulness and candor" are always at issue, even without specific hearing issue, *citing William M. Rogers*, 92 FCC 2d 187, 199 (1982)).

[14] The *RKO General* court permitted the Commission to take terminal action against a license applicant without a specific hearing issue for reasons that seem comparable here as well. It observed:

> RKO's most persuasive objection to the FCC finding that it lacked candor is that the finding was made without giving RKO formal notice and a hearing on the charge. The FCC acknowledges a "technical failure to issue such a formal designation order" . . . and admits that "[i]n the normal case a hearing probably would have been warranted." . . . Ordinarily, such an admission would constitute grounds for reversal, for courts "have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" *Groppi v. Leslie*, 404 U.S. 496, 502, 92 S. Ct. 582, 586, 30 L.Ed.2d 632 (1972)(quoting *In re Oliver*, 333 U.S. 257, 273, 68. S.Ct. 499, 507, 92 L.Ed. 682 (1948)). We conclude, however, that RKO's conduct has been so egregious and so conspicuous that we cannot say the FCC's decision was an abuse of its authority. No purpose would have been served in this case by extending administrative proceedings that had already moved well into their second decade. The evidence of RKO's lack of candor was obvious from the documents that RKO itself had submitted to the FCC in this proceeding, as the applicants competing with RKO had been arguing for years. The Commission needed only to draw legal conclusions from "facts already known." *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919, 924 (D.C. Cir. 1973). In this context, the FCC was not required to designate the candor issue and reopen the proceeding for an evidentiary hearing that would have served no purpose. *See, e.g., Independent Bankers Ass'n of Georgia v. Board of Governors of the Federal Reserve*, 516 F.2d 1206, 1220-22 (D.C. Cir. 1975); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 445 (1972).

670 F.2d at 231. In that respect, the *RKO General* court did not intend to announce any especially new law. *See* 670 F.2d at 230-236. For as the court there aptly recounted, the law has long held that a full-blown evidentiary hearing is not required merely to draw factual and legal inferences from undisputed evidence. *See Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972). Even where "contradictory allegations and affidavits . . . create some possibly unresolved factual issue," there may be no invariable right to a full evidentiary hearing before the agency can make a fair and determinative judgment. *Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968). Here, the ALJ simply drew adverse inferences from the undisputed written documents before him, after duly considering appellant's unsupported and highly implausible denials. In the mind of the finder of fact, a further hearing would have caused unnecessary delay and served no additional purpose. In passing, we also recall again that this is a cellular mobile licensing proceeding, and the court has held that in order to streamline and expedite such licensing an ALJ may decide all issues on the basis of "paper hearings," and need not provide for live witness examination (or cross-examination) if unnecessary for a full disclosure of the operative facts. *Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182, 184-186 (D.C. Cir. 1985). And, the *RKO General* court also recited the precept, as reflected in *William M. Rogers*, *supra* note 13, that "truth and candor" are always in issue, even without a separate issue. 670 F.2d at 232.

[15] *See* Appellant's Motion, *supra* note 11.

[16] But the ALJ did not act on that evidence alone. Other demonstrative evidence was, at a minumum, corrobative of a lack of complete candor. In addition to Sheldon Schuman's January 9, 1990 letter to appellant's "clients," written in his official capacity as General Counsel of Genesis Enterprises (*see supra* note 6), and advising clients also of the earlier retention of David Irwin (who today represents appellant in this appeal, *see supra* note 7), the ALJ had before him appellant's letter to Schuman of January 24, 1991 finally conveying the money for Schuman's January 30 prehearing appearance (*see supra* note 5). We note that even that $3,000 check was postdated to January 29, the day before the initial prehearing conference, and that appellant was yet in debt to Sullivan & Worcester for $24,057.18. *MO & O*, para. 9. In considering appellant's claim of absolute ignorance of the law regarding the need for a formal appearance, and in the face of the totality of the evidence later made available to him, we are reminded by Commissioner Duggan of:

> Groucho Marx's famous line when he played a husband caught in extramarital *flagrante delicto* : "Who are you going to believe -- me, or your own eyes?

Dorothy J. Owens, 5 FCC Rcd 6615, 6628 (1990)(dissenting statement). In reconsidering appellant's earlier representations and the disruption caused (and to yet be caused) by the new, demonstrative evidence, the ALJ was entitled, we would think, to rely upon his own eyes. *See RKO General, supra*. Little more evidence would appear to have come of a hearing, "paper" or otherwise; and the ALJ simply considered the paper before him, and decided. Appellant knew her truthfulness was on the line, even without the special announcement of an "issue," from the moment the Joint Motion to Dismiss was lodged. She supplied no new evidence in response thereto.

[17] It is here that *Folkways Broadcasting, supra*, offers the least support to appellant. There the Board had before it a motion to enlarge, supported by the affidavit of a stranger to the ongoing hearing, alleging that an applicant knew (or must have known) of certain tape recordings it had previously indicated ignorance of, because the applicant owned the studio where the recordings were made. 33 FCC 2d at 814. It certainly was not clear to the *Folkways* Board that the affidavit proved concealment of facts from the Board, but it held that sufficient question had been raised for further exploration. *Id.*, at 815. Unlike *Folkways*, the ALJ here had written correspondence both to and from appellant herself, which correspondence appellant has neither denied nor disclaimed, but merely persists in a claim of ignorance. This places the instant facts more squarely within the ambit of RKO General, where the evidence upon which the Commission took summary action was based upon documents and pleadings supplied by the applicant itself. As here, only inferences were left to be drawn as between the demonstrative evidence and RKO's own pleading denials, and we assume naturally that our appellant has not withheld any additional evidence, demonstrative or otherwise, to this date.

[18] Indeed, the Commission's entire cellular radio/telephone policy is rooted in its finding that the availability of a second cellular system in each market, in competition with the local wireline monopoly, "would best serve the public interest, convenience and necessity," and it departed radically from its standard licensing practices to a lottery system *precisely* to expedite the availability of *competitive* service. *See Cellular Communications System*, 86 FCC 2d 469 (1981).

[19] There is some irony, we concede, in the fact that appellant is already in hearing as to her past truthfulness on her claims of ignorance, and in the ALJ's determination that adding another issue traversing still another claim of "ignorance" would disrupt the proceeding. Be that as it may, the law permits summary action for conduct occurring "before the eyes" of the forum. Appellant's conduct at Genesis Enterprises did not so occur, and summary action could not, and was not taken, on *that* conduct. Not so on the matter of her late appearance, a matter occurring directly in the face of the ALJ. We further believe that, inasmuch as appellant's excuse for her original late filing was undercut by facts subsequently revealed, dismissal would have been justified even on the more conventional grounds. *See generally Juan Galiano*, 5 FCC Rcd 2446 (Rev. Bd. 1990)(late appearance refused where claim of ignorance of appearance requirement not supported by surrounding facts), *review denied*, 5 FCC Rcd 6442 (1990), *recon. denied*, 6 FCC Rcd 891 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-610

In the Application of

RAVEESH K. KUMRA — File No. 10019-CL-P-340-A-88

For Construction authority to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Radio Telecommunication Service to serve Market 340, California 5- San Luis Obispo Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1991; Released: August 16, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On July 2, 1991, ZDT Partnership filed a Motion for Leave to Intervene, pursuant to 47 CFR §1.223(c), and Exceptions, for purposes of appealing a *Summary Decision of Administrative Law Judge Richard Sippel*, 6 FCC Rcd 3352, released June 5, 1991. Oppositions were filed by the Common Carrier Bureau and Raveesh K. Kumra, to which ZDT replied. ZDT has not justified its dilatory attempt to intervene "near the end of the Commission's proceeding." *Spanish International Broadcasting Co., v. FCC*, 385 F. 2d 615, 626 (D.C. Cir. 1967).

2. The application of Raveesh K. Kumra seeking authority to construct a cellular system in RSA Market 340A, was designated for a 47 U.S.C. §309(e) trial-type hearing on character issues. *See Hearing Designation Order*, 5 FCC Rcd 116 (1990). The Common Carrier Bureau was made a party to the hearing, *id.*, para. 11, and Frank Mirgon, who had also filed a competing application for Market 340A, intervened in the hearing. *Memorandum Opinion and Order*, FCC 90M-642, released March 29, 1990. ZDT, another applicant for Market 340A, did not seek to intervene "within thirty days" of the scheduled hearing as required by 47 U.S.C. §309(e). Appeal, p. 2. *See also* 47 CFR §1.223(a).

3. Extensive discovery produced thousands of pages of documents, and four days of depositions from an essential witness, who was granted immunity by the Department of Justice. Thereafter, Mirgon withdrew from the case, and the Bureau and Kumra filed a Joint Motion for Summary Decision. However, the Presiding Judge directed the Bureau to investigate the allegations of still another potential witness, Mr. Om Parkash Kalra, who had informally contacted the Presiding Judge. *Summary Decision*, 6 FCC Rcd 3352 (para. 2). After receiving a report from the Bureau that Kalra's allegations were undocumented and uncorroborated, the Presiding Judge on June 5, 1991 released his *Summary Decision*, resolving all the relevant issues.

4. ZDT's petition, which was filed July 2, 1991, recognized that it must demonstrate good cause for late intervention pursuant to 47 CFR §1.223(c). Appeal, p. 4. An attached declaration of its counsel recites:

> ZDT did not petition to intervene in CC Docket No. 89-610 prior to this time because the Common Carrier Bureau was a party to the proceeding. Accordingly, ZDT believed that the Bureau would represent the interests of ZDT, and all of the other mutually exclusive applicants, by its participation in the proceeding to determine whether Raveesh K. Kumra has the character qualifications to be a Commission licensee. ZDT's participation before this time would have been cumulative of the Bureau's efforts. However, after reviewing many of the pleadings and Orders contained in this docket, I have concluded that the Bureau was in error in signing the Joint Motion for Summary Decision.
>
> I believe that the ALJ made several erroneous rulings and that his Summary Decision should be vacated. In addition, I have spoken with Mr. Om Parkash Kalra regarding the serious allegations he has made regarding Mr. Kumra. It is my belief that Mr. Kalra made his allegations in good faith and that Mr. Kalra is honest and truthful. I believe that this proceeding must be remanded to the ALJ for the taking of further evidence. Granting ZDT status as an intervenor will assist the Commission in determining whether Kumra is qualified to be a Commission licensee.

The Bureau responds that, procedurally, "ZDT's filing is an outrage." ZDT, claims the Bureau, has "failed to demonstrate that its participation will assist the Commission... [and] has presented no new evidence but has merely recounted matters that were fully considered previously." Bureau Opposition, 2.

5. *Discussion:* We will dismiss ZDT's dilatory request, filed more than sixteen months after the deadline set by Congress in 47 U.S.C. §309(e). The legal basis for intervention proffered here is virtually identical to that rejected in *International Panorama TV Inc.*, 2 FCC 2d 637 (Rev. Bd. 1966), *affirmed sub nom. Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967). There, as here, intervention was sought "near the end of the Commission proceeding." The court found that (*id.*, at 626-627):

> [A]ppellant presented its petition seeking, for the first time, leave to intervene in the proceeding in order that it might attack the examiner's initial decision. It contemporaneously filed exceptions to the decision with a supporting brief, and a motion to reopen the record in order to adduce further evidence . . . . [A]ppellant indicated surprise that the Broadcast Bureau, which had resisted intervenor's application throughout the hearing, would not challenge the decision, and urged that it

be admitted as a party for the purpose of arguing its position to the Review Board and, if necessary, to the Commission.

The Board noted that the petition to intervene was untimely and that it did not advance any reason as to why intervention could not have been seasonably sought. It accordingly dismissed the petition and the associated pleadings, and the Commission denied appellant's application for review and reversal of the Board's order. We sustain the action of both.

In *Spanish International*, the Court condemned petitioner's reliance upon the Bureau "to carry the battle before the Commission," followed by the belated attempt to enter the case after an unfavorable decision. It held that the Commission's denial of intervention was "entirely in keeping with Congressional objectives and [its] prior decisions." 385 F.2d at 627-628.

6. Here, dismissal of ZDT's intervention motion is consistent with, and fully supported by, the reasoning in *Spanish International*, which was recently cited with approval by the D.C. Circuit, sitting *en banc*, in *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 76 (D.C. Cir. 1991). We also agree with the Bureau that ZDT has proffered no new evidence, and we shall therefore dismiss its motion for leave to intervene, and related pleadings.

7. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Intervene, and Exceptions filed by ZDT Partnership on July 2, 1991 ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and
Telegraph Company

Comparably Efficient
Interconnection Plan for
Enhanced Services Complex

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1991; Released: August 8, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 13, 1991, pursuant to the requirements of the *Computer III* proceeding, the American Telephone and Telegraph Company (AT&T) filed an Amendment to its approved Comparably Efficient Interconnection (CEI) plan for its Enhanced Services Complex (ESC).[1] AT&T's Enhanced Service Complex currently provides a number of interactive voice and interactive data services, including voice messaging and electronic messaging offerings. AT&T proposes to expand its current offering by providing outbound calling capabilities through its ESC that would enable customers to make calls to third parties without disconnection from the ESC. In this order, we approve AT&T's Amendment to its ESC CEI plan.[2]

II. BACKGROUND

2. The Commission's rules permit AT&T to provide collocated and noncollocated enhanced services on an integrated basis pursuant to the nonstructural safeguards developed in the *Computer III* decisions.[3] Under the requirements of the *Phase I Order* and the *Phase I Reconsideration Order*, AT&T may offer a specific enhanced service, or class of services, on an unseparated basis only after approval of a CEI plan.[4] In its CEI plan, AT&T must demonstrate that it will provide interconnection opportunities to others on an "equal access" basis, making basic facilities available to other enhanced service providers (ESPs) and users on an unbundled and functionally equivalent basis.[5]

III. DISCUSSION

3. In its original CEI plan, AT&T proposed a network architecture that would allow it to offer various voice and data enhanced services through equipment located at AT&T's central offices. According to AT&T, the ESC is comprised of a variety of unregulated equipment, such as digital switching equipment, voice response units, application processors and host gateway processors.[6] AT&T currently offers both interactive voice and interactive data services through its ESC, pursuant to its approved CEI plan. [7]

4. AT&T now requests authority to provide a general outbound calling capability that would enable interactive voice service (IVS) customers to place calls without disconnection from the ESC platform, and to return to the ESC platform immediately afterward to access other interactive voice offerings. AT&T states that although current IVS offerings enable customers to leave voice messages for later delivery to third parties, and to interact with information databases outside of the ESC, the CEI plan does not enable users to reach other third parties on a real-time basis. For example, under AT&T's current service, if a customer calls his or her AT&T voice mailbox and receives an urgent message to call home, the end user must first hang up and disconnect from the ESC platform before calling home. Under AT&T's proposed service, the ESC would permit the customer receiving a similar message to call home directly without hanging up the phone.

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[1] AT&T Plan for Enhanced Services Complex, *Memorandum Opinion and Order*, 4 FCC Rcd 6974 (1989) (Comm. Carr. Bur.) (*AT&T ESC Order*); Amendment to AT&T's Plan for Enhanced Services Complex, *Memorandum Opinion and Order*, 6 FCC Rcd 357 (1991) (Comm. Carr. Bur.) (*IDS Amendment Order*).

[2] No party filed comments on AT&T's proposed amendment, which was placed on public notice March 12, 1991.

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order and Phase I Reconsideration Order vacated sub nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) *appeal pending sub. nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*), *Phase II Order vacated sub. nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990), *appeal pending sub. nom.* California v. FCC, No. 88-7183 (9th Cir. pet. for rev. filed May 13, 1988).

The *Computer III* requirements governing AT&T's provision of enhanced services were not challenged before the Ninth Circuit and the Commission has reinstated the *Computer III* decisions that allow AT&T to provide enhanced services on an integrated basis subject to nonstructural safeguards. Computer III Remand Proceedings, *Report and Order*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990).

[4] In the *Phase I Reconsideration* the Commission relieved AT&T of the comprehensive ONA requirements of the *Phase I Order*, but required AT&T to implement an approved service-specific CEI plan as a precondition to offering each enhanced service integrated or collocated with its basic service facilities. 2 FCC Rcd at 3042, para. 45.

[5] *Phase I Order*, 104 FCC Rcd at 1036.

[6] *IDS Amendment Order*, 6 FCC Rcd 357 (1991).

[7] *AT&T ESC Order*, 4 FCC Rcd 6974 (1989); *IDS Amendment Order*, 6 FCC Rcd 357 (1991).

AT&T states that its proposed outbound calling capability would allow it to meet existing consumer demand and compete with enhanced service competitors that currently offer a general outbound calling capability as part of their ESC-type offerings.

5. The *Phase I Order* lists nine CEI parameters that all plans must satisfy.[8] These parameters are designed to ensure that the basic services used in the provision of a carrier's enhanced services are available to other ESPs in an equally efficient manner. In addition, all CEI plans must satisfy the CEI pricing requirements and nonstructural safeguards regarding the allocation of joint costs, customer proprietary network information, nondiscrimination reporting, and provision of network technical information. AT&T states that its outbound calling capability will only use those basic services previously described in its initial ESC CEI plan. AT&T adds that those "basic services will interconnect with the ESC in exactly the same manner as they do today and will be taken at tariffed rates."[9] AT&T asserts that its amendment raises no new CEI issues, and that it will continue to satisfy the *Computer III* CEI requirements and the Commission's other nonstructural safeguards in the manner described in its approved CEI plan.

6. In the *AT&T Enhanced Services Complex Order* and *IDS Amendment Order*, we found that AT&T's proposed offering of interactive voice and interactive data services through the ESC complied with the CEI parameters, CEI pricing requirements, and the other nonstructural safeguards described in the *Phase I Order*. We note that no parties have filed comments opposing this amendment. We find that AT&T's Amendment complies with the requirements of the *Phase I Order*. Accordingly, we approve this Amendment to AT&T's CEI Plan for its ESC.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, the Amendment described herein to AT&T's CEI Plan for Enhanced Services Complex IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[8] *Phase I Order*, 104 FCC 2d at 1028-1043. The nine CEI parameters are: interface functionality; unbundling of basic services; resale; technical characteristics; minimization of transmission costs; installation; maintenance and repair; end user access; CEI availability; and recipients of CEI.

[9] Amendment to AT&T's Comparably Efficient Interconnection Plan for Enhanced Services Complex at 2, February 13, 1991 (Amendment).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-226

In the Matter of

NYNEX Telephone Companies — Transmittal Nos. 3 and 39

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: August 2, 1991; Released: August 2, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On January 29, 1991, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 3 on behalf of New York Telephone, introducing Fiber Based Channel Terminations (FBCT) into the existing Voice Grade Service and Digipath Digital Service II (DDS II) sections of NYNEX Tariff F.C.C. No. 1. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the transmittal on February 25, 1991. On February 26, 1991, Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, suspend and investigate.[1] NYNEX filed its reply on March 11, 1991.[2] The tariff revisions are scheduled to become effective on August 4, 1991. For the reasons discussed below, we suspend this transmittal for one day, impose an accounting order, and initiate an investigation of the rates for FBCT.

2. NYNEX will provide FBCT where lightwave facilities are available between a customer-designated premises and its normal serving wire center. NYNEX Transmittal 3 Description and Justification at 5. This service will not be available for connection to multiplexed DS1 or shared use facilities, however. The offering requires a minimum of five Voice Grade and DDS II Channel Terminations, and a minimum service period of three months. *Id.*

II. SUMMARY OF PLEADINGS

A. Petitions

3. MFS claims that the proposed new service fails to meet the net revenue test. MFS Petition at 4-5. According to MFS, NYNEX fails to provide the documentation necessary to show that this service will reduce an anticipated revenue loss. *Id.* at 5-6. MFS further argues that NYNEX understates the nonrecurring charges (NRCs) for FBCT. According to MFS, NYNEX assumes that the average customer will obtain 17 circuits through this service, even though the tariff allows customers to take a minimum of five circuits. *Id.* at 6. MFS maintains that NYNEX should have based its calculations for NRCs on the assumption that the average customer will obtain five circuits through this service. *Id.* at 7. MFS also argues there are inconsistencies in NYNEX's cost support materials. *Id.* For example, notes MFS, NYNEX states that the FBCT rates will recover fully distributed costs, while also asserting that implementation of the new service will result in a net revenue loss. *Id.* MFS also raises concerns regarding the vagueness of certain tariff provisions and the discriminatory effect of the tariff. *Id.* at 8-9.

4. MCI filed a petition to suspend and investigate Transmittal 3, claiming that the rates are significantly above fully distributed costs for FBCT. MCI Petition at 2. In addition, MCI argues that because FBCT includes the use of 1.544 Mbps High Capacity fiber facilities between the customer premises and the local serving wire center for that premises, it uses facilities supporting existing services. *Id.* at 3. MCI objects that NYNEX not only fails to adjust the costs of any existing service, but fails to even consider other services. *Id.*

B. Reply

5. NYNEX replies that its tariff satisfies the price cap rules. NYNEX Reply at 3. In particular, says NYNEX, its transmittal meets the net revenue test, in that net revenues would be greater with FBCT than if the service were not introduced. *Id.* at 4. It maintains that without FBCT, revenues would drop an estimated $2.2 million; with the new service, however, revenues are estimated to drop only $1.9 million. *Id.* at 5. NYNEX also argues that it adequately supported the projected revenue effects of FBCT in its tariff filing. *Id.* at 5-6. According to NYNEX, it based its NRCs for FBCT on a projected average fill rate for the service of 17 circuits. *Id.* at 7. If it computed NRCs as suggested by MFS, NYNEX claims, the rates would not recover its average costs. *Id.*

III. DISCUSSION AND DESIGNATION OF ISSUES TO BE INVESTIGATED

6. The Common Carrier Bureau concludes, based on our review of NYNEX Transmittals 3 and 39, and the associated pleadings, that the possibility exists that the rates for FBCT are unreasonably high in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). Because customers of this new service may be

[1] MFS also filed a motion to accept its late-filed pleading. According to MFS, it was unable to file its petition on February 25, the petition due date, because of word processing problems. MFS hand-delivered copies of its petition and motion to accept a late-filed pleading to NYNEX's counsel and the Common Carrier Bureau. NYNEX does not oppose the motion. MFS has demonstrated sufficient cause for its late-filed petition. Accordingly, we grant its motion.

[2] Pursuant to Special Permission No. 91-605, NYNEX filed Transmittal No. 39 to modify Transmittal 3 on July 26, 1991. Transmittal 39 includes information which, *inter alia*, revises the cost support for FBCT.

subject to excessive rates, we will suspend the offering for one day, impose an accounting order, and initiate an investigation into the reasonableness of these rates.[3]

7. The Bureau initiates this investigation to determine whether the rates for FBCT are just and reasonable. In order to assist the Commission in resolving that question, NYNEX is directed to provide the following information in its direct case with respect to the cost of providing FBCT service:

(1) Explain the direct costs for FBCT. Provide a 12-month showing of these direct costs and include all supporting workpapers.

(2) Explain how the fixed cost loadings for this service were determined. Explain also the ratio of direct unit cost to unit investment and direct unit cost to unit price for FBCT and other NYNEX special and switched access services.

(3) Provide a study showing the effect of FBCT on demand and revenues, including the demand and revenues of other services. Include supporting workpapers for estimates of demand and revenues.

(4) In the event that NYNEX claims that the rate for FBCT should include a risk premium, the carrier's direct case should provide the information described in paragraph 43 of the *Part 69 ONA Order*.[4]

(5) If NYNEX's offering fails a net revenue test when the FBCT rates are set at fully distributed cost levels, the carrier's direct case should address whether the Commission should permit NYNEX to base its rates at a level that will generate net revenue, or whether NYNEX should be required to base its rates at a level reflecting fully distributed cost.

(6) Explain the cross-elastic effects between the carrier's existing Voice Grade service and DDS II channel terminations and FBCT.

IV. PROCEDURAL MATTERS

8. This investigation will be conducted as a notice and comment proceeding. CC Docket No. 91-226 has been assigned for this purpose. NYNEX shall file its direct case not later than [six weeks after release of this Order]. The direct case shall present the carrier's position with respect to the issues described in this Order. Pleadings responding to the direct case must be filed not later than [four weeks after direct cases], and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." NYNEX may file a "Rebuttal" to oppositions or comments not later than [two weeks after oppositions]. Pleadings should set forth and address each of the designated issues separately, specifically referencing the numbered paragraphs designating issues.

9. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554.

10. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

11. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

12. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by the NYNEX Telephone Companies in Tariff F.C.C. No. 1, Transmittal Nos. 3 and 39.

14. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by the NYNEX Telephone Companies ARE SUSPENDED for one day.

15. IT IS FURTHER ORDERED that the NYNEX Telephone Companies SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 91-631 is assigned for this purpose.

16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the NYNEX Tele-

[3] The Common Carrier Bureau has determined that a longer suspension would not be in the public interest. Allowing this transmittal to become effective will immediately provide NYNEX customers with an opportunity to obtain a service which offers the benefits of fiber optic digital technology. Therefore, the Bureau does not wish to delay NYNEX's implementation of this new service.

[4] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Final Order, FCC 91-186, para. 43, released July 11, 1991 (*Part 69 ONA Order*).

phone Companies shall keep accurate account of all amounts received pursuant to the rates which are the subject of this investigation.

17. IT IS FURTHER ORDERED that the petitions against NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 3, filed by MCI Telecommunications Corporation and Metropolitan Fiber Systems, Inc., ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

18. IT IS FURTHER ORDERED that the motion to accept a late-filed pleading, filed by Metropolitan Fiber Systems, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Midyear 1986 Access
Tariff Filings

Ameritech Operating Companies
Tariff F.C.C. No. 2 — Transmittal No. 56

Pacific Bell
Petitions for Extension of Waiver

ORDER

Adopted: August 5, 1991; Released: August 5, 1991

By the Deputy Chief, Common Carrier Bureau:

1. The above-captioned local exchange carriers (LECs) requests waiver[1] of that portion of the Commission's *December 19 Order* directing LECs to provide originating WATS access lines (WALs) with Feature Group A (FGA) and Feature Group B (FGB) services.[2] The Commission has previously granted the Ameritech Operating Companies (Ameritech) and Pacific Bell (Pacific) waivers of this requirement.[3] The pending waiver petitions are unopposed.

2. Ameritech indicates, as it has in its previous waiver petitions, that major modifications would have to be made to the billing systems in order to provide originating WALs in connection with FGA. Ameritech Petition at 4. Ameritech contends that the cost of implementing a Commission Order should be the determining factor if the perceived benefits outweigh the cost. Ameritech maintains, however, that in this case, no benefit would result from instituting the requirement to offer originating WALs in connection with FGA service because there continues to be no demand for the service. *Id.* Ameritech states that any interexchange carrier (IC) wishing to provide outWATs service to customers served by nonconforming offices can use WATS access line extensions (WALE) to connect those customers to offices with equal access capability. If a WALE would be required by an IC but not American Telephone and Telegraph Company, the charge is waived. *Id.* at 5.

3. Pacific states that it continues to be unable to accurately calculate the credits for the carrier common line charge which would be due to interexchange carriers on WALs ordered in conjunction with either originating FGA or FGB service. Pacific Petition at 2. It also states that if the extension is granted, it would continue to provide nonchargeable WATS access line extensions from its end offices which have not been converted to equal access to a distant equal access WATS serving office as an alternative to providing WALs in conjunction with originating FGA or FGB services. *Id.*

4. The pending waiver requests are similar to those filed previously by the LECs. As there continues to be no demand for the service at issue and the cost of providing the service is not insignificant, we conclude that a further one-year extension of the Ameritech Operating Companies and Pacific Bell waiver requests is warranted under the present circumstances.

5. Accordingly, IT IS ORDERED that the waiver granted by this Order SHALL EXPIRE on August 1, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

[1] Petition for Extension of Waiver, filed by Pacific Bell, July 12, 1991 (Pacific Petition); Petition for Continuation of Waiver, filed by Ameritech Operating Companies, July 29, 1991 (Ameritech Petition).

[2] Midyear 1986 Access Tariff Filings, 1 FCC Rcd 1247 (1986) (*December 19 Order*).

[3] *See* Ameritech Operating Companies *et al*, Petitions for Indefinite Waiver, 2 FCC Rcd 4544 (Com. Car. Bur. 1987) (waiver granted to the Ameritech Operating Companies, Pacific Bell, the BellSouth Telephone Companies, and GTE Telephone Operating Companies); Centel Telephone Companies *et al.*, 2 FCC Rcd 5257 (Com. Car. Bur. 1987) (waiver granted to Centel and the Bell Atlantic Telephone Companies); *See also* Midyear 1986 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 4838 (Com. Car. Bur. 1988); Midyear 1986 Access Tariff Filings, Petitions for Waiver, *Memorandum Opinion and Order*, 5 FCC Rcd 4840 (Com. Car. Bur. 1990). These waivers expired on August 1, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-95

In the Matter of

Communications
Satellite Corporation

ERRATA

Released: August 5, 1991

By the Chief, Common Carrier Bureau:

1. On April 18, 1991, the Common Carrier Bureau released an Order, DA 91-487, in the above-captioned proceeding. The following corrections are made to that Order.

2. The final sentence of paragraph 4 (excluding the footnote, which is unchanged) should read:

> World Communications, Inc. (Worldcom) has insisted upon its entitlement to the disputed line items in the proposed refund distribution, amounting to $1.295 million with interest accrued to June 30, 1989 (Appendix A, lines 167 and 168).

3. The third sentence of paragraph 6 should read:

> The amount at issue is $31,203 with interest accrued to June 30, 1989.

4. The final sentence of paragraph 8 should read:

> Accordingly, the refund apportioned to IRI need not be disbursed and line 75 of Appendix A should reflect Comsat as the payee.

5. To reflect these textual corrections, Appendix A should read as follows:

> Line 27 should list refund calculations to Comsat Intl. Comm. Inc. as

1984	1985	1986	Total Refund
-0-	$18,068	$143,638	$161,706

> Line 81 should list refund obligations to JISO/TOKYO as

1984	1985	1986	Total Refund
$28,639	$56,682	$25,987	$111,308

> Line 75 should list "Comsat" as the payee (customer).

> Line 166 should list "Wold Communications" as the payee (customer).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of Section 80.453 of the Rules to permit public coast station WHU247 to serve mobile vehicles on land.

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1991; Released: August 14, 1991

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. Texoma Recreational Marine Association (Texoma), licensee of very high frequency (VHF) public coast station WHU237, has requested a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to serve a limited number (approximately 100) of land mobile vehicles on a secondary basis. This action grants the requested waiver.

II. BACKGROUND

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. The Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. The Commission stated: "The comments point out that maritime frequencies in many areas of the country are already extremely congested. In other areas of the country, however, lakes and rivers freeze over and the seasonal factors greatly affect capacity." *Report and Order* at paragraph 7. Nevertheless, the Commission recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to, or derogation of, maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has granted three such waivers.[1] The Commission based the waivers on the fact that each station had limited marine traffic which was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

III. DISCUSSION

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. WHU247 is located in an area beyond incorporated limits and serves Lake Texoma which straddles the Texas-Oklahoma border. Marine traffic on the lake is primarily that of recreational boats and generally occurs during the months of June to September, and during weekends and holidays of the rest of the year. In support of its request, Texoma indicates that it will provide services to a limited number of land vehicles, approximately 100, when they operate in an area five miles from the location of the WHU247 tower. Texoma states that its service to the land vehicles would be available only when there is an operator on duty, to assure that the maritime vessels are provided priority use of the allocated channels.

4. We are waiving the rules to permit Texoma to provide subsidiary service to the limited number of land vehicles as requested. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by Texoma must be type accepted for use in the Maritime Services (Part 80), the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22) and must be capable of operating only on the maritime public correspondence channels authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any channel other than those authorized for station WHU247. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rules Making* (*NPRM*) in PR Docket No. 86-2, 51 Fed. Reg. 4552 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land vehicles utilize a public coast station's excess capacity to operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit

[1] *See In the Matter of Answer Exchange, Inc.*, 3 FCC Rcd 633 (1988), and *In the Matter of Recreational Marine Association*, 4 FCC Rcd 6287 (1989), and *In the Matter of Whidbey Telephone Company*, 4 FCC Rcd 8305 (1989).

identifier. This increases the public coast station's incentive to control the vehicles' communications because enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle. Therefore, the license of Texoma will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

IV. CONCLUSION

7. In view of the above, IT IS ORDERED that the requests for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license WHU247 submitted by Texoma Recreational Marine Association to serve land mobile vehicles, on a secondary basis, ARE GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-137

In the Matter of

Amendment of Section 73.202(b),	RM-C005
Table of Allotments,	RM-6998
FM Broadcast Stations.	
(Menomonie and Spencer, Wisconsin and Waseca, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1991; Released: August 14, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5357 (1989),[1] and the *Order to Show Cause*, 5 FCC Rcd 5938 (1990) ("*Order* "), directed to Hackman Broadcasting, licensee of Station WOSX, Spencer, Wisconsin.[2] The *Notice* proposed, *inter alia*, the reclassification of Station KOWO-FM, Channel 221A, Waseca, Minnesota, to Channel 221C3, and modification of the license issued to Waseca Communications, Inc. ("Waseca"), to specify the higher powered channel. In response to the *Notice*, Waseca filed comments stating its intent to file an application for a Class C3 license and provided a noncommercial educational impact study. Phillips Broadcasting Company ("Phillips"), licensee of Station WMEQ(FM), Channel 221A, Menomonie, Wisconsin, filed a counterproposal.[3]

2. Phillips counterproposed the substitution of Channel 221C3 for Channel 221A at Menomonie, Wisconsin, and modification of its license for Station WMEQ(FM) to specify operation on Channel 221C3 in order to provide the community with a wide coverage area FM channel. Although not required by the standards of signal overlap, out of an abundance of caution, Phillips provided a noncommercial educational impact study for Station WMEQ(FM) operating on Channel 221C3, Menomonie, and for Station WOSX, Spencer, operating on Channel 222A. To accommodate the upgrade, Phillips proposed to substitute Channel 222A for Channel 221A, Spencer, Wisconsin, and modify the license for Station WOSX accordingly. Phillips acknowledged a responsibility to reimburse Hackman Broadcasting for the reasonable and prudent expenses Station WOSX would incur in changing to another Class A channel. Phillips indicated that upgrades could be accomplished at Waseca and Menomonie if a special reference site is used for the Menomonie upgrade. The *Order* was issued to allow Hackman Broadcasting an opportunity to comment on the ordered channel change.

3. Waseca filed comments supporting the counterproposal insofar as it will create a favorable outcome in this proceeding to upgrade Channel 221A to Channel 221C3 at Waseca, Minnesota.

4. In response to the *Order*, Hackman Broadcasting states that it does not object to the modification of its license for Station WOSX, Spencer, Wisconsin, provided it is reimbursed for the reasonable costs associated with accomplishing the channel change.

5. After consideration of the record in this proceeding, we believe it would be in the public interest to substitute Channel 221C3 for Channel 221A, Waseca, Minnesota, Channel 221C3 for Channel 221A, Menomonie, Wisconsin, and Channel 222A for Channel 221A, Spencer, Wisconsin, in compliance with the Commission's spacing requirements.[4] Based on a review of the preclusion studies provided, we find there will be no significant impact on noncommercial educational service development in the region if Channel 221C3 is allotted to Waseca, Minnesota, and Menomonie, Wisconsin. We shall modify the license for Station KOWO-FM, Waseca, Minnesota, to specify operation on Channel 221C3 and Station WMEQ(FM), Menomonie, Wisconsin, to specify operation on Channel 221C3 in accordance with Section 1.420(g) of the Commission's Rules. We shall also modify the license for Station WOSX, Spencer, Wisconsin, to specify operation on Channel 222A in lieu of Channel 221A in accordance with the Commission's Rules.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Menomonie, Wisconsin	221C3
Spencer, Wisconsin	222A
Waseca, Minnesota	221C3

[1] The *Notice*, issued in MM Docket No. 89-133, *et al.* proposed to amend the FM Table of Allotments for 149 Class A FM stations at various locations throughout the United States and territorial possessions by reclassifying their operation from Class A to Class C3 facilities and proposed modification of their station authorizations accordingly.

[2] Hackman Broadcasting's application for assignment of the license for Station WOSX to DN Communications was granted on December 28, 1989 (BALH-891106HZ).

[3] Public Notice was given September 20, 1989, Report No. 1796 (RM-6998).

[4] The coordinates for Channel 221C3, Waseca are 44-02-45 and 93-23-08 at the site proposed in Phillips' counterproposal. The coordinates for Channel 221C3, Menomonie are 44-47-00 and 91-45-00. Since the proposal that resulted in this allotment was initiated prior to October 2, 1989, the licensee of Station WMEQ(FM) may avail itself of Section 73.213(c) of the Commission's Rules with respect to Station WRLS-FM, Channel 221A, Haywood, Wisconsin. The coordinates for Channel 222A, Spencer are 44-48-35 and 90-21-51. Since the proposal that resulted in this allotment was initiated prior to October 2, 1989, the licensee of Station WOSX may avail itself of Section 73.213(c) of the Commission's Rules with respect to the proposed allotment of Channel 222C3, Clintonville, Wisconsin.

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KOWO-FM, Channel 221A, Waseca, Minnesota, IS MODIFIED to specify operation on Channel 221C3, and the license for Station WMEQ(FM), Channel 221A, Menomonie, Wisconsin, IS MODIFIED to specify operation on Channel 221C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, that pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license for Station WOSX, Channel 221A, Spencer, Wisconsin, IS MODIFIED to specify operation on Channel 222A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-850531KO except the channel as specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-850531KO except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Order* by Certified Mail, Return Receipt Requested, to

Hackman Broadcasting
702 Willow Drive
Spencer, Wisconsin 54479

DN Communications, Inc.
RR 2, Box 106A
La Crescent, Minnesota 55947

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-237

In the Matter of

Amendment of Section 73.202(b), RM-7744
Table of Allotments,
FM Broadcast Stations.
(Bayboro, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 31, 1991; Released: August 14, 1991

Comment Date: October 7, 1991
Reply Comment Date: October 22, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Atlantic Broadcasting, Inc. ("petitioner"), licensee of WKZF(FM) (formerly WJCS), Bayboro, North Carolina, requesting the substitution of Channel 250C3 for Channel 250A and modification of its license to specify operation on the higher class channel. Petitioner states that it will apply for the upgraded facilities, if granted.

2. We believe the public interest would be served by proposing the substitution of Channel 250C3 for 250A at Bayboro, North Carolina, and modifying the license of WKZF(FM) at Bayboro, because it would provide the community and the surrounding areas with improved service. We note that petitioner has proposed a site which is 17.3 kilometers (10.8 miles) southeast of the community, which is consistent with the Commission's minimum distance separation and city grade contour requirements. We also note that petitioner's engineering report states, "[a] complete visual inspection of the clear area was conducted by the petitioner and it was concluded that there would be plenty of acreage available to locate WJCS within the clear area without disturbing any wetlands and clear of area airports." However, a staff engineering analysis shows that the site designated by the actual coordinates submitted by the petitioner are in water and therefore not suitable for tower construction.[1] The staff on its own has proposed other coordinates for a site 11.6 kilometers (7.2 miles) southeast of Bayboro, which appears to be on dry land and consistent with the Commission's minimum distance separation and city grade contour requirements. [2] We request that petitioner address this issue in its comments by proposing a site which is fully spaced and suitable for tower construction with respect to environmental concerns in view of Bayboro's proximity to the coastline along Pamlico Sound. We also request that petitioner's comments address Federal Aviation Administration concerns with respect to the proposed site's proximity to area airports. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 250C3 at Bayboro, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bayboro, North Carolina	250A	250C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 7, 1991,** and reply comments on or before **October 22, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis F. Begley, Esq.
Reddy, Begley & Martin
2033 M Street, N.W.
Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed

[1] The coordinates submitted by petitioner are North Latitude 35-04-16 and West Longitude 76-36-15.
[2] The coordinates for Channel 250C3 at Bayboro are North Latitude 35-07-18 and West Longitude 76-38-40.

Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-192

In the Matter of

Amendment of Section 73.202(b),	RM-5928
Table of Allotments,	RM-6262
FM Broadcast Stations.	
(Oroville, Monte Rio, and	
Fort Bragg, California)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1991; Released: August 15, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 2690 (1988), seeking comments on two separately filed petitions for rule making. The first, filed on behalf of Oroville Radio, Inc. ("ORI"), proposed the substitution of Channel 249B for Channel 249A at Oroville, California, and modification of the license for Station KEWE(FM) to specify the higher power channel (RM-5928). The second petition, filed on behalf of Southcom, Inc. ("SI"), proposed the substitution of Channel 249B1 for Channel 249A at Monte Rio, California, and modification of the license for Station KMGG(FM) accordingly (RM-6262). In order to accommodate the latter proposal, SI proposed the substitution of Channel 253A for Channel 249A at Fort Bragg, California, and modification of the license issued to Wade Axell, of Axell Broadcasting ("Axell"), for Station KSAY(FM), and the substitution of Channel 249B1 rather than Channel 249B for Channel 249A at Oroville.[2] In response to the *Notice*, ORI, SI and Axell filed comments.[3] ORI and SI each filed reply comments. SI also filed a supplement to its reply comments,[4] and Axell filed additional comments.[5]

2. The *Notice* observed that the distance between proposed Channel 249B at Oroville and Channel 249B1 at the preferred site of Station KMGG(FM) at Monte Rio is 163 kilometers, whereas, under the minimum distance separation requirements in effect at that time, a distance of 211 kilometers is required between Class B and B1 co-channels. However, we determined that the proposals could co-exist if site restrictions were placed on each (*i.e.*, 20.7 kilometers (12.8 miles) east of Oroville[6] and 20.3 kilometers (12.6 miles) southwest of Monte Rio).[7] Further, the Commission found that the Monte Rio site restriction would obviate the need for the channel substitution at Fort Bragg. In the event of disagreement, the Commission noted that the proposals would be comparatively considered in accordance with the guidelines set forth in *Greenup, KY*, 2 FCC Rcd 4319 (1987), *aff'd in relevant part*, 4 FCC Rcd 3843 (1989), *aff'd in relevant part*, 6 FCC Rcd 1493 (1991).

3. ORI comments that while it is not inflexible to the use of an alternate site, it is precluded from consenting to the site suggested by the Commission in the *Notice*. ORI asserts that Oroville is a "foothill community," located at the mouth of the Feather River Canyon. To the north lies Table Mountain,[8] with an elevation ranging from 900 to 1600 feet, whereas Oroville's elevation is 175 feet above mean sea level (AMSL). To the northeast is the Feather River Dam (approximately 900 feet high), while approximately 2 miles east of the community begins the Sierra Nevada Mountains (which range in height from approximately 1000 feet to over 3,000 feet). ORI claims that in addition to the lack of access via roads and electrical power to the site suggested by the Commission, intervening terrain factors would preclude delivery of an unobstructed signal over Oroville.

4. ORI claims that if permitted to operate from its proposed site, it could provide a first FM service to 616 people in an area comprising 140 sq. km., and a second FM service to 11,443 listeners in an area of 880 sq. km. ORI contends that its proposal would also provide additional service to Chico (population 32,680),[9] Yuba City (population 21,560), and Marysville (population 10,940).

5. SI objects to the 20.3 kilometer site restriction on its proposal, as suggested by the Commission in the *Notice*, to obviate the channel substitution at Fort Bragg. SI comments that such a restriction would place the transmiter for Station KMGG(FM) 6.3 kilometers off the California coast, and therefore is not a feasible site. SI reiterates that the Fort Bragg substitution is required to accommodate its proposal, and restates its intention to reimburse Axell for

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[1] The community of Fort Bragg, California, has been added to the caption.

[2] In the *Notice*, we explained that although SI offered that Channel 249B1 could be considered at Oroville at a restricted site to eliminate the conflict, we would not propose it as an option since ORI did not express an interest in a Class B1 allotment in its petition. Further, we stated that if ORI should determine that a Class B1 channel is an acceptable alternative, it could advise us of that fact in comments.

[3] Axell's initial comments were subsequently withdrawn.

[4] The supplement consists of an original of SI's engineering statement which was initially filed in facsimile form.

[5] Axell's comments were late-filed, but accompanied by a motion to accept. The Commission's rules do not contemplate the filing of pleadings beyond the comment period, unless specifically requested. In this instance, Axell's comments serve to clarify his intentions in response to the *Order to Show Cause* issued in this proceeding, and therefore they have been accepted for consideration.

[6] As indicated in the *Notice*, Channel 249B could not be used at ORI's present site due to the close proximity of Station KWIN(FM), Channel 249A, Lodi, California. Coordinates proposed for Channel 249B at Oroville were 39-30-31 and 121-32-46.

[7] Coordinates specified in the *Notice* for Channel 249B1 at Monte Rio were 38-19-14 and 123-08-58.

[8] It is from this location that ORI desires to locate its transmitter, which is 12.8 kilometers (7.9 miles northeast) of the community at coordinates 39-34-17 and 121-25-20.

[9] Population figures were supplied by ORI.

the reasonable costs associated in switching frequencies for Station KSAY(FM) in the event the Monte Rio proposal is adopted.[10]

6. SI comments that, based upon its own engineering study utilizing the criteria set forth in the *Greenup Report and Order*, 2 FCC Rcd 4319 (1987), its Class B1 proposal would serve a larger population than ORI's Class B proposal. SI concedes that although ORI's proposed Class B service area would be larger, most of the projected area lies in sparsely populated mountainous regions, as well as areas dedicated to national forest use.[11] SI's engineering study also claims that neither proposal would provide a first aural service,[12] and only a negligible area would be provided a second service at nighttime. SI summarizes the proposals comparing use of a Class B1 at Monte Rio and Oroville versus a Class B at Oroville only, and finds that using 0.5 and 0.7 mV/m contours for Classes B and B1, respectively, the Class B upgrade at Oroville would provide a negligible second aural service to 994 people. On the other hand, the combined Class B1 upgrades would provide service to a greater total gain area population than would the Class B station at Oroville alone.[13] In summation, SI urges that while it believes its proposal would more clearly serve the public interest, based on the larger population its Class B1 proposal would serve, modification of each station to Class B1 status would result in greatly enhanced spectral efficiency relative to granting only one of the proposals.

7. ORI's response maintains that (using a 1.0 mV/m contour for coverage determinations) its proposal would bring a first FM aural service to a white area of 140 sq. km., containing a population of 616, and a second FM service to 11,443 people in an area of 880 sq. km. Moreover, ORI claims that its modification proposal would increase its service area to reach an additional 168,300 listeners in a total gain area of 5,743 sq. km. ORI claims that in view of Monte Rio's proximity to the San Francisco-Santa Rosa areas, which contain at least ten high-powered FM facilities, the need for expanded service at Monte Rio is reduced to a *de minimis* position. Conversely, ORI contends that since Oroville is located in a valley, and is surrounded by mountains to the east, it has a greater need for expanded service. While ORI believes its proposal is more deserving of a Class B channel than SI's proposal at Monte Rio, it nevertheless asserts that should the Commission allot Class B1 channels to both communities, it will build and operate Station KEWE(FM) accordingly.

8. SI disputes the reputed value of the increased service area and populations of ORI's proposal. According to SI's engineering statement, it believes ORI used incorrect signal strengths to predict coverage of the Class B and B1 stations. According to SI, rather than following the procedure in *Greenup, supra*, using the 0.7 mV/m contour to calculate the coverage of Class B1 operations and the 0.5 mV/m contour to calculate the coverage of Class B operations, ORI used the 1 mV/m contour for both classes. SI remarks that not only does such calculation produce an underestimate of the coverage of any proposed upgrade when applied to neighboring operations, it also produces an incorrect estimate of the areas receiving new service. SI's engineering statements claim that FM service is already provided by four area stations to the entire area which would be covered by Station KEWE's Class B contour. SI urges that although ORI claims it will serve a larger population within its projected service area, the source of such estimates is not explained, nor verified. Finally, in SI's engineering analysis, it is claimed that the site proposed by ORI for its Class B operation is plotted incorrectly on its coverage map. As a result, SI urges that the assumptions made and calculations provided by ORI should be rejected.

9. After carefully reviewing the proposals, we believe that Oroville and Monte Rio are each deserving of wide coverage FM stations. However, we cannot grant both Channel 249B to Oroville and Channel 249B1 to Monte Rio. The distance between the two reference points is 176 kilometers, whereas a distance of 211 kilometers is required in this instance.[14] Therefore, we must be guided by the allotment priorities considered in comparative situations, 90 FCC 2d 88 (1982), which are:

(1) first fulltime aural service

(2) second fulltime aural service

(3) first local service

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[10] Axell has agreed to the requested substitution of Channel 253A for Channel 249A at Fort Bragg.

[11] While SI claims that its engineering study shows that Station KMGG(FM) would serve a greater population in its gain area than the Oroville station, SI believes that using the *Greenup* method, as it did, results in an inflated population gain figure for the Oroville station. SI states that this is because the *Greenup* method employs the protected service contours for the upgraded facilities, which is the 0.5 mV/m contour for the proposed Class B station at Oroville and the 0.7 mV/m contour for the Class B1 station at Monte Rio. SI claims that this was not a problem in the *Greenup* case itself because both proposals were for Class B1 facilities. However, to the extent that a literal application of the *Greenup* criteria gives the Oroville station an unfair advantage, SI believes that it should not be followed here and that the upgrades should be compared using the same basic measure. We note that the Commission clarified in the two subsequent *Greenup* decisions that the 1 mV/m contour (encompassing a reduced area of coverage) would be used for comparing population gain areas between competing proposals for upgraded facilities. Accordingly, any population figures derived using the 0.5 mV/m and 0.7 mV/m contours are inflated and cannot serve as a basis for comparison of gain areas.

[12] In this regard, SI remarks that daytime service is provided to the entire gain areas by several AM stations, including Stations KNBR, KGO and KCBS in Monte Rio, and Stations KFBK, KRAK and KKSA in Oroville.

[13] SI computed the population and gain area figures using 0.5 mV/m and 0.7 mV/m for Classes B and B1, respectively:

Second service	Area	Population
Class B1 (Monte Rio and Oroville)	28.0 sq. km.	218
Class B (Oroville)	191.4 sq. km.	994
Additional Service		
Class B1 (Monte Rio and Oroville)	7,969 sq. km.	267,801
Class B (Oroville)	11,058 sq. km.	155,615

[14] ORI's proposed coordinates for Channel 249B at Oroville are 39-34-17 and 121-25-20. Coordinates for proposed Channel 249B1 at Monte Rio are 38-32-24 and 122-57-39.

(4) other public interest matters

Co-equal weight is given to priorities (2) and (3).

According to a staff engineering analysis, neither SI's proposal at Monte Rio nor ORI's proposal at Oroville would provide any first or second aural service. On the contrary, the entire gain areas for the Monte Rio and Oroville proposed upgrades are completely encompassed by at least two fulltime aural services - Stations KNBR(AM) and KGO(AM), San Francisco, California. Therefore, we will formulate our decision pursuant to priority (4) of the allotment criteria, "other public interest matters." As stated in note 11, *supra*, SI's use of 0.5 and 0.7 mV/m as the primary service contours for determination of coverage is incorrect. Accordingly, we performed our own engineering and population analysis of the proposals, using the 1.0 mV/m signal strength as the primary service contour for each proposal, to determine which could provide a new service to the largest population within the gain areas of the predicted Class B and alternate Class B1 contours at Oroville, as well as the predicted Class B1 contour at Monte Rio. *See Greenup, KY*, 2 FCC Rcd 4319 (1987), *aff'd. in relevant part*, 4 FCC Rcd 3843 (1989), *aff'd. in relevant part*, 6 FCC Rcd 1493 (1991).

10. Based upon our analysis, we calculate that ORI's Class B proposal, at best, would provide a new service to approximately 168,777 people. Conversely, Class B1 channels at both Oroville and Monte Rio would provide a new service to approximately 77,323 and 162,683 people, respectively, representing a collective increase in service to an additional 240,006 people. (See Appendix.) Therefore, and in view of the fact that ORI has indicated its consent to a Class B1 modification in order to achieve its desire to expand its service area, we believe the public interest dictates the allotment of a Class B1 channel at each community. This observation is further supported by the fact that due to the remote mountainous areas surrounding Oroville, a Class B1 service will provide essentially the same service to that community as a Class B allotment.

11. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 249B1 for Channel 249A at Oroville, California, and modify the license of Station KEWE(FM), and substitute Channel 249B1 for Channel 249A at Monte Rio and modify the license of Station KMGG(FM). In order to accommodate the Monte Rio modification, we will substitute Channel 253A for Channel 249A at Fort Bragg, California, and modify the license of Station KSAY(FM). Channel 249B1 can be allotted to Oroville at the ORI's specified site 12.8 kilometers (7.9 miles) northeast[15] of the community. Channel 249B1 can be substituted for Channel 249A at Monte Rio at the authorized site for Station KMGG(FM).[16] Channel 253A can be substituted for Channel 249A at Fort Bragg at the authorized site for Station KSAY(FM).[17]

12. Commission policy requires reimbursement to affected stations for reasonable costs associated with changing frequencies. *See Circleville, OH*, 8 FCC 2d 159 (1967). SI has reiterated its intention to reimburse Axell for its reasonable costs in switching channels for Station KSAY(FM) at Fort Bragg.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Fort Bragg, California	237A, 244A, 253A
Monte Rio, California	249B1
Oroville, California	249B1

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Wade Axell, of Axell Broadcasting (BLH-881121KA), for Station KSAY(FM), Fort Bragg, California, IS MODIFIED to specify operation on Channel 253A in lieu of Channel 249A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license (BLH-881121KA) except the channel, as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license (BLH-881121KA) except for the channel as specified above and a license application (Form FCC 302) is filed within ten (10) days of commencement of program tests.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Southcom, Inc. for Station KMGG(FM), Monte Rio, California, IS MODIFIED to specify operation on Channel 249B1 in lieu of Channel 249A at Monte Rio, California, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

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[15] Coordinates for Channel 249B1 at Oroville are 39-34-17 and 121-25-20.

[16] Coordinates for Channel 249B1 at Monte Rio are 38-32-24 and 122-57-39.

[17] Coordinates for Channel 253A at Fort Bragg are 39-28-03 and 123-45-34.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Oroville Radio, Inc. for Station KEWE(FM), Oroville, California, IS MODIFIED to specify operation on Channel 249B1 in lieu of Channel 249A at Oroville, California, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KSAY(FM), Fort Bragg, California, as follows: Wade Axell, Axell Broadcasting, P.O. Box 2269, Fort Bragg, California 95437.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

The following is a summary of the comparisons of the population of the counties within the predicted gain areas of a Class B service contour versus those of a Class B1 service contour for Station KEWE(FM), Channel 249A, Oroville, California. Also shown is the predicted increase in population coverage in the gain area of a Class B1 contour for Station KMGG(FM), Channel 249A, Monte Rio, California. Our analysis used the 1.0 mV/m field strength as the primary service contour for comparing each stations' areas of proposed coverage. The percentages of increase indicates the predicted increase in coverage by Class B and Class B1 facilities over their existing Class A coverage in the listed counties.

In this study, cities with populations greater than 5,000 were given special consideration. Their populations were subtracted from the total populations of the counties in which they are located, and the remaining population of each county was assumed to be uniformly distributed throughout that particular county.

Class B (Oroville)

Counties

Butte (increase from 30% to 95%) pop. 85,994 x 65% = 55,896

Plumas (increase from 0% to 10%) pop. 17,340 x 10% = 1,734

Sierra (increase from 0% to 25%) pop. 3,073 x 25% = 768

Nevada (increase from 0% to 25%) pop. 44,948 x 25% = 11,237

Yuba (increase from 40% to 80%) pop. 20,681 x 40% = 8,272

Sutter (increase from 0% to 20%) pop. 33,510 x 20% = 6,702

Glenn (increase from 0% to 5%) pop. 21,350 x 5% = 1,068

Tehama (increase from 0% to 1%) pop. 29,398 x 1% = 294

Subtotal **85,971**

The community of Oroville (pop. 8,683, in Butte County) is already covered by the existing Class A service contour of Station KEWE(FM), is not in the gain area, and its population has not been included in the total.

The community of Red Bluff (pop. 9,490, in Tehama County) is not covered by the proposed Class B primary service contour, is not in the gain area, and its population has not been included in the total.

The community of Olivehurst (pop. 8,929, in Yuba County) is not covered by the proposed Class B primary service contour, is not in the gain area, and its population has not been included in the total.

The following communities will be covered by the proposed Class B primary service contour in the gain area but have not been included in the above county populations, and therefore their populations must be added to the gain area to get the total population in the gain area.

Chico (pop. 26,603) and Paradise (pop. 22,571) in Butte County

Grass Valley (pop. 6,697) in Nevada County

Marysville (pop. 9,898) and 75% of Linda (pop. 7,669) in Yuba County

50% of Yuba City (pop. 9,368) in Sutter County

Subtotal **82,806**

Addition of the population of the above communities to the subtotal of 85,971 results in the increase in population to be served by a Class B facility at Oroville, totalling 168,777.

Class B1 (Oroville)

The following is a summary of the population of the counties within the predicted gain area of a Class B1 service contour versus the present coverage provided by the Class A facilities of Station KEWE(FM):

Butte (increase from 30% to 75%) pop. 85,994 x 45% = 38,697

Plumas (increase from 0% to 5%) pop. 17,340 x 5% = 867

Sierra (increase from 0% to 5%) pop. 3,073 x 5% = 154

Nevada (increase from 0% to 5%) pop. 44,948 x 5% = 2,247

Yuba (increase from 40% to 60%) pop. 20,681 x 20% = 4,136

Sutter (increase from 0% to 2%) pop. 33,510 x 2% = 670

Subtotal **46,771**

Additionally, the following communities will be covered by the proposed Class B1 primary service contour but have been deducted from the above county populations:

30% of Chico (pop. 7,981), and Paradise (pop. 22,571) in Butte County

Subtotal **30,552**

Addition of the population of the above communities to the subtotal of 46,771 results in the increase in population to be served by a B1 upgrade of Station KEWE(FM) at Oroville, totalling 77,323 persons.

The community of Oroville (pop. 8,683, in Butte County) is already covered by the existing Class A service contour of Station KEWE(FM) and has not been included in the total.

The following communities are not covered by the proposed Class B1 primary service contour and are not included in the total:

Grass Valley (pop. 6,697) in Nevada County

Marysville (pop. 9,898), Linda (pop. 10,225) and Olivehurst (pop. 8,929), all in Yuba County

Yuba City (pop. 18,736) in Sutter County

Class B1 (Monte Rio)

The following is a summary of the population of the counties within the predicted gain areas of a Class B1 service contour versus the present coverage provided by the Class A facilities of Station KMGG(FM):

Sonoma (increase from 35% to 80%) pop. 140,696 x 45% =	63,313
Mendocino (increase from 0% to 2%) pop. 49,684 x 2% =	994
Lake (increase from 0% to 10%) pop. 36,366 x 10% =	3,637
Napa (increase from 0% to 15%) pop. 48,320 x 15% =	7,248
Marin (Northwest Division) (increase from 0% to 25%) pop. 8,142 x 25% =	2,036
Subtotal	**77,228**

Additionally, the following communities will be covered by the primary service contour of the proposed Channel 249B1 at Monte Rio, but have been deducted from the above county populations:

75% of Santa Rosa in Sonoma County	62,490
Rohnert Park in Sonoma County	22,965
Subtotal	**85,455**

Addition of the population of the two communities reflected above to the subtotal of 77,228 results in a combined increase in population to be served with the upgrade at Monte Rio, California, totalling 162,683 persons.

The communities of Healdsburg (pop. 7,217) and Sebastopol (pop. 5,595), both in Sonoma County, are already covered by the existing Class A service contour of Station KMGG(FM) and have not been included in the total.

The following communities are not covered by the proposed Class B1 primary service contour and are not included in the total:

Petaluma (pop. 33,834) and Sonoma (pop. 6,054) in Sonoma County

Fort Bragg (pop. 5,019) and Ukiah (pop. 12,035) in Mendocino County

Napa (pop. 50,879) in Napa County

The combined increase in population to be served by B1 upgrades at both Oroville (77,323) and Monte Rio (162,683) totals 240,006 persons.

Before the
Federal Communications Commission
Washington D.C. 20554

MM Docket No. 90-580

In the Matter of

Amendment of Section 73.202(b),	RM-7503
Table of Allotments,	RM-7658
FM Broadcast Stations.	
(Dorrington and Arnold,[1]	
California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1991; Released: August 14, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 7020 (1990), issued at the request of Matthew J. Cullen ("petitioner") proposing the allotment of FM Channel 291A to Dorrington, California, as its first local aural transmission service. Petitioner filed comments and a counterproposal in response to the *Notice*.[2]

2. The *Notice* raised the issue of whether Dorrington qualifies as a community, as required by Section 307(b) of the Communications Act, since it is not listed in the U.S. Census. Therefore, petitioner was requested to provide sufficient information to demonstrate that Dorrington has the social, economic, cultural or governmental indicia to qualify it as a community for allotment purposes.

3. In response to the *Notice*, petitioner counterproposed the allotment of Channel 291A to Arnold, California,[3] as that community's first local aural transmission service. In support of his proposal, petitioner states that Arnold, with a population of 2,385 according to the 1980 U.S. Census, is the largest and most rapidly growing community in Calaveras County, based upon information provided by the County Clerk.[4] Further, petitioner advises that Arnold has its own schools and a bi-weekly newspaper, as well as numerous major civic organizations such as the Moose, Lions Club, Rotary Club, the American Association of Retired Persons, and the Greater Arnold Business Association, to name a few. Additionally, petitioner categorized 125 business establishments located in Arnold, and advised that several County/State municipal services are also based in the community.[5]

4. We believe the public interest would be served by allotting Channel 291A to Arnold, California, since an interest has been expressed in providing that community with its first local aural transmission service. Channel 291A can be allotted to Arnold consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[6]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Arnold, California	291A

6. IT IS FURTHER ORDERED, That the petition for rule making to allot Channel 291A to Dorrington, California (RM-7503), IS DISMISSED.

7. The window period for filing applications for Channel 291A at Arnold, California, will open on **October 1, 1991,** and close on **October 31, 1991**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Arnold, California, has been added to the caption.

[2] Public Notice of the counterproposal was given March 6, 1991 (Report No. 1839).

[3] In view of the petitioner's failure to express continued interest in pursuing the Dorrington proposal, and the failure of any other party to do so, that request will be given no further consideration and will be dismissed.

[4] Petitioner states that Arnold's population is projected to reflect an increase to 7,361 persons in the 1990 U.S. Census.

[5] In this regard, petitioner advises that the County Road Systems, Cal-Trans, Ebbetts Pass Fire Department, Water District and a library branch are located in Arnold.

[6] Coordinates used for Channel 291A at Arnold are 38-15-20 and 120-21-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-105

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Lonoke, Arkansas and Clarksdale, Mississippi)	RM-7165, 7366

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 7, 1991; Released: August 14, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 1243 (1990), issued in response to a petition for rule making filed on behalf of Dunn Broadcasting Corporation (petitioner), licensee of Station KWTD(FM), Channel 292A, Lonoke, Arkansas, proposing the substitution of Channel 292C2 for Channel 292A at Lonoke and modification of the license for Station KWTD(FM) to specify operation on the higher powered channel. To accommodate this proposal, the *Notice*, as corrected by an *Errata*, 5 FCC Rcd 2012 (1990), proposed the substitution of Channel 287A for Channel 292A at Clarksdale, Mississippi, and modification accordingly of the Class A license of Radio Cleveland, Inc. ("RCI"), for Station WAID(FM).[1] Petitioner's successor in interest, Lonoke Broadcasting Corporation, filed supporting comments in response to the *Notice*. [2] RCI filed a counterproposal and response to the order to show cause. [3] Charleston Broadcasting Company, Inc. ("CBC"), licensee of Station WTGY(FM), Channel 239A, Charleston, Mississippi, filed supporting comments and a counterproposal. [4] Petitioner, RCI and CBC filed reply comments.

2. Lonoke Broadcasting, in its comments, states that it is the successor in interest to Dunn Broadcasting. As the present licensee of Station KMZX-FM, Lonoke, Arkansas (formerly Station KWTD-FM), Lonoke reaffirms the prior statement of petitioner that it will apply for a construction permit to operate Station KMZX on Channel 292C2. In addition, Lonoke reaffirms its willingness to reimburse the legitimate and prudent expenses of Station WAID(FM) associated with its change in frequency pursuant to Lonoke's proposal.

3. RCI, licensee of Station WAID(FM), Channel 292A, Clarksdale, submitted a counterproposal requesting the substitution of Channel 293C2 instead of Channel 292A at Clarksdale. RCI contends that Station WAID(FM) can be upgraded and remain fully spaced to the proposed operation of KWTD(FM) on Channel 292C2 at Lonoke and to all other relevant FM facilities. RCI further contends that since Channel 293C2 is a mutually exclusive higher class adjacent channel at Clarksdale, the Commission may modify WAID(FM)'s license without considering competing expressions of interest, in accordance with Section 1.420(g)(3) of the Commission's Rules. RCI states that an upgrade of Station WAID(FM) to Class C2 would allow both Clarksdale and Lonoke to receive new wide-area coverage FM services.

4. After a careful evaluation of the proposal and comments filed in this proceeding, we believe that the public interest would be served by the substitution of Channel 292C2 for Channel 292A at Lonoke and the substitution of Channel 293C2 for 292A at Clarksdale because this would provide wide area coverage facilities to both communities. A staff engineering analysis has determined that Channel 292C2 can be alloted to Lonoke at the site specified by the petitioner in compliance with the Commission's minimum distance seperation requirements with a site restriction of 19.7 kilometers (12.3 miles) south. [5] Channel 293C2 can be alloted to Clarksdale at the site specified by the licensee with a site restriction of 9.4 kilometers (5.8 miles) northeast. [6] In accordance with Section 1.420(g) of the Commission's Rules, we will substitute Channel 292C2 for Channel 292A at Lonoke, and modify the license of Station KMZX(FM). In addition, we

[1] Although the petitioner requested the substitution of Channel 229A for Channel 292A at Clarksdale, we substituted Channel 287A for consideration because Channel 229A was short-spaced to a pending rule making proposal at Forrest City, Arkansas.

[2] Subsequent to the filing of the petition, the Commission approved the assignment of the license for Station KWTD(FM) to Willis Broadcasting Corporation and its wholly-owned subsidiary, Lonoke Broadcasting Corporation. The call letters for the station were changed to Station KMZX-FM.

[3] Public Notice of the counterproposal was given on May 7, 1990, Report No. 1816.

[4] A review of CBC's counterproposal reveals that it is procedurally defective. CBC states that the substitution of Channel 287A for Channel 292A at Clarksdale will free-up Channel 293 for allotment to Charleston, Mississippi. Channel 293 can then be upgraded from Class A to Class C-3, with the license of WTGY(FM) modified accordingly. As we stated in the *Notice*, whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, Commission policy requires the benefiting party or parties to reimburse the affected station for costs incurred. In this case CBC failed to state its commitment to share equally in the reimbursement of Station WAID(FM) for the costs associated with the requested modification of its license. Therefore, CBC's counterproposal is defective and is hereby dismissed. *See Brookville and Punxsutawney, PA*, 3 FCC Rcd 5555 (1988), and *York, AL*, 4 FCC Rcd 6923 (1989). In any event, even if CBC's counterproposal had been accepted into this proceeding and considered comparatively with RCI's counterproposal, it would not have prevailed because the population in the gain area for the Clarksdale station is substantially greater than that for the Charleston station. Specifically, based upon the pleadings filed in this proceeding, the population in the gain area for the Clarksdale station is 92,145 persons and for the Charleston station is 33,243. Our engineering analysis shows that the population in the gain areas for the Clarksdale and Charleston stations is 90,674 and 43,196, respectively.

[5] The coordinates for Channel 292C2 are North Latitude 34-37-02 and West Longitude 91-49-22.

[6] The coordinates for Channel 293C2 at Clarksdale are North Latitude 34-14-10 and West Longitude 90-29-02.

will also substitute Channel 293C2 for Station 292A at Clarksdale, Mississippi, and modify the license of Station WAID(FM).

5. In order to upgrade the Lonoke station, Lonoke Broadcasting recognizes that the Clarksdale station must change frequencies. The *Notice*, as corrected by the *Errata*, proposed to change the Clarksdale station to Channel 287A. The Clarksdale proponent has requested that it change its frequency to Channel 293C2 and obtain an upgrade, which we are granting, in lieu of going to Channel 287A which does not permit an adjacent channel upgrade. Since Lonoke Broadcasting admittedly benefits from the change in frequency for the Clarksdale station and has stated its willingness to reimburse the Clarksdale station, we shall order reimbursement to the Clarksdale licensee for the reasonable costs in changing its frequency equivalent to the costs of changing to a Class A channel. *See Mitchell, South Dakota*, 30 R. R. 2d 1688 (1976).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Lonoke, Arkansas	292C2
Clarksdale, Mississippi	243C3, 269A, 293C2

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of Lonoke Broadcasting Corporation for Station KMZX, Channel 292A, Lonoke, Arkansas, and Radio Cleveland, Inc., for Station WAID(FM), Channel 292A, Clarksdale, Mississippi, ARE MODIFIED to specify operation on Channels 292C and 293C2, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WAID(FM) as follows: Radio Cleveland, Incorporated, P.O. Drawer 668, Clarksdale, Mississippi 38614.

10. For further information concerning this proceeding, contact Arthur Scrutchins, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-309

In the Matter of

Amendment of Section 73.202(b),	RM-7097
Table of Allotments,	RM-7310
FM Broadcast Stations.	RM-7488
(Bowdon, Griffin, Hogansville, and Sparta, Georgia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 2, 1991; Released: August 14, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 3769 (1990), issued in response to two interrelated petitions for rule making. They both require the substitution of Channel 288A for Channel 248A at Hogansville, Georgia. Design Media, Inc. ("DMI"), licensee of Station WQUL(FM),[2] Channel 249A, Griffin, Georgia, requested the substitution of Channel 248C3 for Channel 249A, and the modification of Station WQUL(FM)'s license to specify the higher class channel. In order to accomplish the upgrade at Griffin, DMI also requests the substitution of Channel 288A for Channel 248A at Hogansville, Georgia (RM-7097).[3] Alexander Mitchell Communications Corporation ("AMCC"), licensee of Station WSKS(FM), Channel 249A, Sparta, Georgia, seeks the substitution of Channel 249C3 for Channel 249A at Sparta, and modification of the license for Station WSKS to specify operation on Channel 249C3. The upgrade at Sparta also requires the substitution of Channel 248C3 for Channel 249A at Griffin, Georgia, and the substitution of Channel 288A for Channel 248A at Hogansville, Georgia (RM-7310). AMCC and DMI filed comments restating their intentions to apply for the respective channels, if allotted. Info-Air, Inc. ("Info-Air"), an applicant for Channel 248A at Hogansville, Georgia, filed opposing comments.[4] Terry C. Jenks and Bowdon Broadcasters, Inc. ("Bowdon") filed comments and counterproposals (RM-7488).[5] AMCC, Bowdon, and DMI filed reply comments. AMCC and DMI filed comments in response to the counterproposals. After the close of the record DMI filed a request for leave to file supplemental reply comments. Bowdon filed a request for withdrawal of its counterproposal.[6] Jenks filed a request for leave to file response to supplemental comments and filed supplemental comments. DMI filed an opposition to Jenks' request for leave to file response. T. Wood and Associates, Inc. ("Wood"), permittee of Channel 248A at Hogansville, Georgia, filed a request for expedited action in this proceeding.[7]

2. In its counterproposal Jenks requested the allotment of Channel 288A to Bowdon, Georgia, as that community's first local service, rather than the substitution of Channel 248C3 at Griffin and the substitution of Channel 249C3 at Sparta. Jenks states that Bowdon is an incorporated city with a population of 1,743[8] people and currently has no local radio station. Jenks contends that the allotment of Channel 288A to Bowdon as a first local service is superior to the upgrades at Griffin and Sparta. Jenks states his intention to apply for Channel 288A at Bowdon, if allotted.

3. In its reply comments, AMCC argues that the timing of the counterproposal raises the question of economic or competitive benefit to be derived from blocking this proposal, and the good faith of Jenks. AMCC notes that Jenks has not provided any indication of interest in the Bowdon allotment. AMCC further states that while Bowdon is currently without a local broadcast service, Jenks has not provided information to demonstrate that Bowdon is actually in need of any service. Jenks has not addressed whether Bowdon is self governing, whether it provides its residents with municipal services such as police and fire protection, water and sewer service, or schools and employment. AMCC alleges that the questions become even more significant when the fact that Bowdon is located on the edge of the Atlanta urbanized area is considered. In this regard, AMCC states that the Commission should consider whether the Huntington doctrine should be applied to the Bowdon proposal. *See Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951). The doctrine provides an exception to the Commission's policy of awarding a first local service preference in those cases in which a first local service preference is claimed for a community contiguous to a larger central city. AMCC argues that because of Bowdon's proximity to Atlanta and its location on the edge of the Atlanta urbanized area, Bowdon should be denied the first local service preference that Jenks seeks, citing *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), and *Bessemer and Tuscaloosa, Alabama*, 5 FCC 669 (1990).

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[1] The community of Bowdon has been added to the caption.

[2] Effective September 3, 1990, the call letters of Station WKEU(FM) were changed to WQUL(FM).

[3] T. Wood and Associates, Inc. ("Wood"), became the ultimate permittee for Channel 248A, Hogansville, Georgia, by *Memorandum Opinion and Order*, MM Docket No. 90-52, February 28, 1991. The grant was conditioned on the outcome of this rule making proceeding.

[4] We find that Info-Air's comments are moot due to the fact that its application has been dismissed. Therefore, any comments responsive thereto will not be discussed.

[5] Public Notice of the Bowdon counterproposal was given September 5, 1990, Report No. 1825, (RM-7488). Terry C. Jenks' counterproposal was not put on public notice; however, it has been accepted as comments in support of Bowdon's proposal, since both proposals requested the allotment of Channel 288A to Bowdon, Georgia, as that community's first local FM service.

[6] On October 3, 1990, Bowdon requested withdrawal of its counterproposal. Although Bowdon has withdrawn its interest in the allotment of Channel 288A at Bowdon, Jenks filed a timely filed expression of interest and it will be considered.

[7] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings.

[8] Population figures are taken from the 1980 U.S. Census.

4. In its reply comments to the counterproposals, AMCC argues that if both Design and AMCC are allowed to go Class C3 status, AMCC will provide service of 1.0 mV/m or greater intensity to a 137.64 square kilometer area encompassing 1,248 persons currently served by no other full time AM or FM service. AMCC contends that the boundaries of this "white area" are composed of the 0.5 mV/m contour of Station WSB(AM), Atlanta, Georgia, the present 1.0 mV/m contour of Station WSKS, Channel 249A, Sparta, Georgia, and the proposed 1.0 mV/m contour of Station WSKS(FM) on Channel 248C3. AMCC states that this white area or first full-time aural service takes precedence over Bowdon's proposal which proposes first local service. [9] However, in an attempt to resolve this conflict, AMCC conducted a channel search and suggested the use of Channel 223A at Bowdon as a 3 kilowatt station Class A facility. [10]

5. DMI, in its reply comments to the counterproposals, restates AMCC's argument that the upgrade of Station WQUL(FM) and Station WSKS(FM) will result in the provision of full-time aural service to a "white area" served by no other full-time AM or FM station. DMI contends that a white area first fulltime aural service is to be preferred over the conflicting Bowdon proposal. DMI also suggests that Channel 223A be allotted to Bowdon to resolve this conflict. [11]

6. We have carefully reviewed the record in this proceeding and have determined that there is no other channel available to resolve the conflict between the proposed upgrades for the Griffin and Sparta, Georgia, stations on the one hand and the proposed new allotment for Bowdon, Georgia, on the other hand. Thus, we must choose between the conflicting proposals and base our decision on the following allotment criteria as set forth in *Revision of FM Policies and Procedures,* 90 FCC 2d 88 (1982).

(1) first full-time aural service

(2) second full-time aural service

(3) first local service; and

(4) other public interest matters.

(Co-equal weight given to priorities (2) and (3)).

In applying these priorities, we note, at the outset, that DMI and AMCC's claim that the grant of the upgrade for the Sparta station would result in a first full-time aural reception service to 1,743 people is incorrect. Our engineering analysis reveals that upgrading the Sparta station would not result in any full-time reception service because the claimed "white area" would be covered entirely by the 1.0 mV/m contour of Station WSAA(FM), Channel 226A, Warrenton, Georgia, currently authorized by a construction permit, and is covered substantially by the 1.0 mV/m contour of Station WHAN(FM), Channel 274A, Sparta. These two construction permits were ignored by DMI and AMCC's "white area" study. Moreover, when these two stations are considered, the claimed area of second full-time reception service (*i.e.*, "gray area") is reduced to a small portion of Warren County encompassing approximately 113 people. Therefore, we are called upon in this case to resolve a conflict between an upgrade proposal allotment to Bowdon that triggers priority three because Bowdon has no local aural transmission service.[12]

7. Although the *Revision of FM Policies* provides that priorities (2) and (3) are given co-equal weight, it also provides a mechanism for resolving a conflict between proposals raising these priorities. It states:

> In cases involving a choice between such second aural and first local services, the populations provided each of those services would be compared. Preference would be given depending on whether more persons would receive a second aural service or a first local service. Under this approach we will continue to give emphasis to local service while avoiding the possibility of anomalous results under the old priorities. [13]

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[9] AMCC acknowledges that its white area study disregarded the construction permit for Station WSAA(FM), Channel 226A, Warrenton, Georgia, but claims that even if this unbuilt station is considered, the proposed upgrade for Station WSKS will provide a second aural reception service (*i.e.*, a "gray area"). AMCC contends that this triggers FM priority two and therefore warrants grant of the upgrade proposals over the new allotment at Bowdon.

[10] We note that an engineering analysis has determined that the proposed allotment of Channel 223A to Bowdon at the coordinates suggested by AMCC (33-38-33 and 85-17-42) would violate the minimum distance separation requirements of Section 73.207 of the Rules because of short-spacings to Station WBTR-FM, Channel 221A Carrollton, Georgia, Station WLWI-FM, Channel 222C, Montgomery, Alabama, and vacant but applied for Channel 223A, Zebulon, Georgia.

[11] In making this alternative proposal, DMI requests that the minimum distance separation requirements existing prior to October 2, 1989, be applied because the lead petition in this proceeding for the Griffin upgrade was filed before October 2, 1989. Since the other proposals were filed after that date, DMI believes that all proposals in this proceeding should be governed by the same set of rules. We disagree. Since the Bowdon counterproposals were filed in August 1990, and are therefore subject to the new spacing rules, any alternative channel for Bowdon must likewise be governed by the new rules. *See Second Report and Order in MM Docket No. 88-275,* 4 FCC Rcd 6375 (1989).

[12] Although DMI argues that we should apply the *Huntington Doctrine* and not consider that the proposed allotment at Bowdon would result in a first local service because of Bowdon's proximity to the larger community of Atlanta, Georgia, we do not agree. First, the *Huntington Doctrine* has only been used in the context change of community of license cases or in comparative hearings involving applications, neither of which are applicable here. Second, even in those cases in which the *Huntington Doctrine* has arisen, the smaller community has been inside the urbanized area of a larger city and a showing has been made of interdependency between the smaller community and the larger urban center. In this instance, Bowdon is located approximately 50 miles from Atlanta and is not inside the Atlanta urbanized area. Furthermore, no showing of interdependency was made. *See, e.g., Faye and Richard Tuck,* 3 FCC Rcd 5374 (1988).

[13] 90 FCC 2d at 92.

In the few cases in which this conflict has arisen, we have compared the population that would receive second full-time aural service (*i.e.*, the gray area population) with the population of the community in which we would provide a first local aural transmission service. [14] Applying this procedure here, we note that the Sparta upgrade would provide a second full-time reception service to 113 people while the allotment of Channel 288A to Bowdon would result in a first local transmission service to a population of approximately 1,743. As a result, the Bowdon proposal is the preferred allotment under the *Revision of FM Assignment Policies*. [15]

8. Channel 288A can be allotted to Bowdon in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.1 kilometers (5.7 miles) southwest, in order to avoid a short-spacing to Station WCHK(FM), Channel 289C2, Canton, Georgia. [16]

9. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bowdon, Georgia	288A

10. The window period for filing applications will open on **October 1, 1991,** and close on **October 31, 1991**.

11. IT IS FURTHER ORDERED, That the petitions for rule making filed by Alexander Mitchell Communications Corporation (RM-7310) and Design Media, Inc. (RM-7097) ARE DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[14] *See, e.g., Conway, Arkansas,* 2 FCC Rcd 6132 (1987). *See also Killington, Vermont,* MM Docket No. 83-357, Mimeo No. 6471, released August 21, 1985.

[15] Although DMI questions the legitimacy of Jenks' expression of interest in the allotment for Bowdon and his motives in filing his petition for rule making, we note DMI has not submitted any extrinsic evidence on this issue. On the contrary, Mr. Jenks has stated in his counterproposal that he will file an application, if the allotment is made to Bowdon. Likewise, DMI questions whether the counterproponent has shown that Bowdon has a need for a first local service. We believe that since Bowdon is an incorporated community of 1,743 people, such a need can be presumed.

[16] The coordinates for Channel 288A at Bowdon are North Latitude 33-28-54 and West Longitude 85-19-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Revisions to Tariff F.C.C. No. 10

Deployment Central Offices

Transmittal Nos. 2893 and 3265

ORDER

Adopted: August 5, 1991; Released: August 7, 1991

By the Deputy Chief, Common Carrier Bureau:

1. AT&T Communications (AT&T) proposes in Transmittals 2893 and 3265 to establish Deployment Central Offices (DCOs) in its administrative tariff, Tariff F.C.C. No. 10, that would be used as pricing points prior to their activation. At present, central offices listed in Tariff F.C.C. No. 10 are used to demarcate and price both interoffice channels (IOCs) provided under Tariff F.C.C. No. 9 and local channels provided under Tariff F.C.C. No. 11, but central offices are not listed in the tariff prior to their activation. AT&T explains that the selective use of DCOs will enable its more timely response to offerings by competitors, whose pricing is not required to be closely aligned with associated physical facilities. AT&T Transmittal Letter at 1-2. The tariff transmittal, as amended by Transmittal 3265,[1] is scheduled to become effective on August 9, 1991.

2. A petition to reject Transmittal 2893 was filed by Advanced Telecommunications Corporation (ATC). In addition, petitions seeking rejection or, in the alternative, suspension and investigation, were filed by Competitive Telecommunications Association (CompTel), US Sprint Communications Company Limited Partnership (US Sprint), and Williams Telecommunications Group, Inc. (WilTel). Each of these parties subsequently filed petitions against Transmittal 3265 which generally incorporate their initial petitions and seek the same relief.

3. ATC argues that the tariff should be rejected because this tariff abandons a rational rate structure premised on physical provisioning for pricing based on non-existent paper facilities. ATC also contends that AT&T has made no showing of the impact of its transmittal upon either the price indexes established by price cap regulation of Tariff No. 9 (which governs interoffice channels) or the cost of service showing required for rate-of-return regulation of Tariff No. 11 (which governs local channels). ATC Petition at 1-2. Specifically, ATC asserts that the pricing of interoffice channels is a restructuring that cannot be filed on a streamlined basis under price caps, and that even were a competitive necessity test relevant, AT&T has failed to justify such a major rate restructure. ATC states that this transmittal enables AT&T to ignore the cost of local loops that AT&T obtains from local exchange carriers (LECs) and resells to its customers, and so abandon the recovery-of-cost premises of the traditional regulation applied to Tariff No. 11 services. *Id.* at 2-3. ATC also says that the tariff changes are rejectionable because the changes are not clear and precise. *Id.* at 3-4.

4. In its second petition, ATC contends that Transmittal 3265 maintains the distance-based discrimination established by Transmittal 2893, and emphasizes that the cost causality requirement of rate regulation has not been supplanted by the application of price cap regulation to AT&T. ATC Petition (Tr. 3265) at 3-4. ATC asserts that periodic reports to the Commission will be proprietary and outside the tariff, so that customers will be unable to determine AT&T's rates and practices from the tariff. *Id.* at 4.

5. CompTel, an industry association of interexchange carriers, states that the DCO transmittal enables AT&T to grant substantial rate discounts to selected customers, and assails this as "patently unreasonable" discrimination in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), as well as an unreasonable practice in violation of Section 201(b) of the Commmunications Act, 47 U.S.C. § 201(b). CompTel says unreasonable discrimination will occur if two AT&T customers are served by the same central offices, and one customer is charged a lower rate based on AT&T's future plan to route his traffic through a new, closer central office. CompTel asserts that AT&T has offered no cost justification for DCO-based rate discrimination, instead justifying the transmittal by general assertions that AT&T's inability to bill on the basis of non-functional COs hampers its responsiveness to competitors' initiatives. CompTel characterizes this argument as an implicit invocation of the competitive necessity doctrine, and asserts that AT&T has failed to satisfy any of the three criteria established by that doctrine. *Id.* at 3-6.

6. CompTel asserts in its second petition that the revisions in Transmittal 3265 fail to cure the discrimination inherent in AT&T's discretionary listing of non-functional central offices for rate calculation purposes, and that AT&T has not even addressed the elements of the competitive necessity doctrine that CompTel contends AT&T has tacitly invoked. CompTel Petition (Tr. 3265) at 3-5. CompTel also argues that the reporting obligations undertaken in Transmittal 3265 are not the best mechanism for policing AT&T's DCO practice, and that the Commission should have allowed public comment on a monitoring program before permitting AT&T to implement its plan. CompTel urges the Commission to make AT&T reports available for public inspection. *Id.* at 5-6.

7. US Sprint asserts that until DCOs are activated, they are simply a ruse to enable AT&T to charge rates to certain customers that are below the costs incurred to provide service, and will lead to cross-subsidization contrary to the public interest. US Sprint adds it is not clear whether DCOs will serve as rating points for all customers eventually served by such facilities, or only for those customers AT&T expects to seek competitive alternatives. If the more limited alternative is the case, US Sprint contends the revisions should be rejected as unreasonably discriminatory and anticompetitive. US Sprint Petition at 2-3. US Sprint finally asserts that the two year hiatus proposed between the date on which AT&T would include DCOs in Tariff F.C.C. No. 10, and the date on which the office is scheduled to become operational, is excessive. *Id.* at 3-4.

8. US Sprint states the revisions in Transmittal 3265 do not alleviate deficiencies in the original tariff. In particular, US Sprint argues that the revenue shortfall attributable to DCO pricing during a year's operations might even equal that of the original transmittal's two-year period, for customers who order access on a piece-part basis. US Sprint Petition (Tr. 3265) at 2-3. US Sprint also contends the information to be filed with DCO transmittals and the semi-annual reports are inadequate to protect against cross-subsidy or otherwise anticompetitive behavior. *Id.* at 3-4.

9. WilTel, which through its subsidiaries provides interstate private line services, also states that setting rates based on "phantom" points of presence violates Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). WilTel asserts that AT&T could undercut its own end-to-end rates by DCO pricing in selected cases while avoiding general reductions in rates. WilTel Petition at 2-3. WilTel contends that judicial and administrative precedents preclude meeting competition by below-cost charges for access service elements, states that such charges are predatory "almost by definition," and adds that Transmittal 2893 violates the Commission's private line rate structure guidelines. *Id.* at 3-6. WilTel argues that only AT&T has sufficient resources to price intercity services "without regard to local transport costs" and so gain customers sufficient to justify construction of a point of presence after the fact. *Id.* at 6-7. WilTel argues that DCO pricing will deaverage rates by conferring preferential rate advantages on customers served by deployment offices, and by reducing access revenues in more competitive LATAs, burdening rural ratepayers. *Id.* at 9-10. Finally, WilTel states that AT&T must provide sufficient information to allow evaluation of DCO pricing under the price cap rules. *Id.* at 10-11.

10. WilTel asserts in its second petition that the revisions fail to eliminate the undue preference accorded targeted customers by predatory, below-cost pricing. WilTel Petition (Tr. 3265) at 2-3. WilTel also states that DCO pricing is premature, in light of the excessive distance sensitivity in present LEC transport rate structures, and the possible expiration of the "equal charge per unit of traffic" rule. *Id.* at 3-4. WilTel contends that DCO pricing could be used to inhibit competition for 800 services, as the advent of number portability approaches, to preclude establishment of competitors' Points of Presence (POPs), or to discipline its customers by providing their competitors with preferential access pricing. *Id.* at 4-7.

11. AT&T replies that its use of DCOs is warranted by other carriers' comparative pricing flexibility, referring to MCI's use of promotion pricing based on "temporary points of presence" and US Sprint's flat-rate offering of dedicated access lines by state. AT&T Reply at 2-4. The proposed offices are not "phantom" or "fictitious" facilities, AT&T asserts, but are limited to instances in which it has approved deployment and committed any funds required for the actual facility. AT&T states it will file annual reports on the status of deployment central offices and individual reports on any location where deployment is delayed, and is willing to file individual reports on any central office whose deployment is uncompleted after a year. *Id.* at 4-5.[2]

12. AT&T responds to discrimination contentions by noting that DCOs will be generally available as pricing points to all customers under tariff, and by arguing that the authorities cited by WilTel are inapposite or superseded. *Id.* at 6-7. The lower rates available to customers closer to an AT&T central office, AT&T argues, are no more unreasonably discriminatory than the existing distance-sensitive rates, which have the same effect, or than geographically limited promotions. *Id.* at 8. Because the transmittal does not change rates or rate levels, AT&T asserts, there is no consolidation or elimination of a rate element, nor any change in the method of charging or provisioning, so that no cost justification or changes in price cap indices are involved. *Id.* at 8-9. Claims of predatory pricing are unfounded because no rate changes are involved and no locations have even been designated for DCO pricing, AT&T adds. Finally, AT&T states that the revision does not alter existing tariff rates, developed on a nationwide averaged basis, and does not alter its tariffs' rate structure or elements, so that the transmital could not violate private line guidelines. *Id.* at 10-12.

13. Replying to the second round of petitions, AT&T states that its generally available DCO pricing gives rise to no discrimination requiring justification under the competitive necessity doctrine, and that its discretion to designate DCOs is a minimal increment to its established discretion to locate and construct central offices. AT&T observes that, in common with its competitors, it already has the ability to establish new central offices in areas where other carriers are about to establish POPs. AT&T Reply (Tr. 3265) at 5-6. AT&T asserts that the supporting data to be provided with each DCO will establish its positive contribution to net revenue, answering contentions of below-cost access pricing, and argues that proprietary costing information is not generally subject to public disclosure. *Id.* at 6-7. AT&T defends the credit to customers who provide their own access to a DCO, stating that this treats such arrangements comparably with customers who provide their own access to fully functional central offices and receive the benefits of a new AT&T office only if they reterminate there. AT&T asserts the termination charge applied to customers who obtain access under its Tariff No. 11 is necessary to maintain rate parity between these customers and those providing their own access. *Id.* at 7-9.

14. The Common Carrier Bureau has reviewed AT&T Transmittals 2893 and 3265, the petitions, and AT&T's replies. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

15. Therefore, IT IS ORDERED that the petitions to reject AT&T Communications Tariff F.C.C. No. 10, Transmittals 2893 and 3265, filed by Advanced Telecommunications Association, as well as the several petitions to reject or, in the alternative, to suspend and investigate Transmittals 2893 and 3265, filed by Competitive Telecommunications Association, US Sprint Communications Company Limited Partnership, and Williams Telecommunications Group, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

FOOTNOTES

[1] Transmittal 3265, filed July 3, 1991, reduces the deployment pricing period from two years to one, and provides for a semi-annual report on DCO pricing generally, as well as analyses of individual DCO initiatives, to be submitted with requests for proprietary treatment. Transmittal 3265 also establishes an access credit for customers who provide their own access, and a termination charge for customers purchasing access from AT&T.

[2] AT&T formalized its intentions in Transmittal 3265. *See* note 1, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. Tariff F.C.C. No. 1 — Transmittal No. 162

ORDER

Adopted: August 6, 1991; Released: August 7, 1991

By the Deputy Chief, Common Carrier Bureau:

1. By Transmittal No. 162, US West Communications, Inc. (US West) introduces Expanded 900 Service, a new service option available with US West's 900 Access Service. This option will permit US West's customers, specifically 900 transport providers, to receive calls dialed as 0+900+NXX-XXXX; currently, these customers can only receive calls dialed as 1+900+NXX-XXXX. *See* Tr. 162 at Section 6.2.7; Description and Justification (D&J) Section 1.2. Because Expanded 900 would make access to 900 services available on a 0+ basis, customers would be able to charge 900 calls to their calling cards.

2. The Expanded 900 option is not offered without 1+900 access service within a local access and transport area (LATA). Calls originating in a LATA in which the customer has not ordered 900 access service will therefore be blocked. In addition, the 0+900 option will be blocked from access to 10XXX and from inmate service. Tr. 162 at Section 6.2.7. There are no recurring rates for the option; however, two additional charges apply to activate the Expanded 900 Service. *See* Tr. 162 at Sections 6.7.1 and 6.8.1(F).

3. On May 28, 1991, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to suspend and investigate Transmittal 162, arguing generally that expansion of 900 access from 1+ calling to 0+ calling would prevent full and effective competition in the 900 transport market. Sprint contends that such expansion may be an unreasonable practice under Section 201(b) of the Communications Act and may work to discriminate in favor of American Telephone and Telegraph Company (AT&T) and against other interexchange carriers (IXCs) offering 900 transport in violation of 202(a) of the Act. Sprint Petition at 1-3. Specifically, Sprint believes that AT&T's apparent conversion of the calling cards it shares with the Bell Operating Companies (BOCs) to proprietary cards, which can only be validated by AT&T, will give AT&T the largest share of calling cards. Thus, Sprint argues, AT&T will be able to handle a greater volume of 0+900 calls than any other IXC, thereby affording AT&T a significant advantage in marketing its transport service to 900 information providers. Sprint fears that AT&T will be able to leverage what will be its dominant position in the calling card market to stifle competition in the 900 transport market. *Id.* at 3.

4. In reply, US West maintains that Sprint presented no evidence that providing the ability to access 900 services via 0+ dialing is an unreasonable practice. US West Reply at 3. US West also states that this service is available to all carriers on a nondiscriminatory basis and therefore does not violate Section 201(b) of the Act. *Id.* Finally, US West asserts that Sprint's arguments regarding card validation are not germane to the instant filing because Expanded 900 service is an access service and not a billing or card validation service. *Id.*

5. The Common Carrier Bureau has reviewed US West Communications Inc., Transmittal No. 162, Sprint's petition, and related pleadings. We conclude that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate US West Communications, Inc., Tariff F.C.C. No. 1, Transmittal No. 162, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3144

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: August 6, 1991; Released: August 8, 1991

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3144 to modify Virtual Telecommunications Network Service (VTNS) Option 23, under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The modifications to Option 23: reduce the basic charge from $186,128 per month to $173,085 per month; modify switched access charges to apply to calls between international locations and the United States; reduce certain measured charges and modify the language in rate schedules A through C to conform with rate schedules A through E used in other options; modify rate schedule F; modify Type II authorization code charges to apply to calls between international locations and the United States; modify the domestic usage volume pricing plan; increase the minimum annual charge; introduce change charges for domestic transmission capabilities (DTCs) with speeds between 64 kbps and 768 kbps, inclusive, and for DTCs with speeds of 45 Mbps; introduce an installation charge waiver; modify the minimum requirement for Rate Option 1 measured remote ports; modify the outage credit units; and modify the DTC and voice transmission capabilities volume pricing plan by expanding the plan to cover additional speeds of DTC network components and increasing the discount rate for 1.5 Mbps DTC network components. *See* AT&T Transmittal No. 3144 Description and Justification (D&J) at 2-5. The transmittal is scheduled to take effect on August 12, 1991.

2. Williams Telecommunications Group, Inc. (Williams), filed a petition to reject or suspend and investigate the Option 23 modifications, or to provide alternative relief, on June 13, 1991. AT&T filed a reply on June 24, 1991.

3. Williams contends that the Option 23 modifications raise the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand*[1] and must be reviewed in light of the remand. Williams Petition at 2-3. Williams argues that AT&T has failed to demonstrate that Option 23 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 23 and AT&T's other services. *Id.* at 3-8. Specifically, Williams charges that if the proposed revisions become effective, Option 23 will be dominated by a single service since over 89 percent of the total anticipated monthly revenues under Transmittal 3144 can be attributed to international service. *Id.* at 6-7 (also asserting that AT&T is attempting to avoid the scrutiny of price cap structural safeguards and to take advantage of its market power in the international service arena by offering a Tariff 12 package consisting of almost 90 percent international service).

4. Williams further argues that even if Option 23 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 8-10 (also alleging that AT&T's profit margin will be reduced by these modifications). Williams also claims that the modifications to Option 23 feature anticompetitive bundling of 800 Service and international service, two noncompetitive services which when totalled account for 90 percent of the annual revenues. *Id.* at 10-13. Finally, Williams alleges that modified Option 23 violates the Commission's policy against geographic rate deaveraging, that it is not generally available, and that it is not in compliance with the Commission's *Private Line Guidelines*. *Id.* at 13-15.

5. AT&T replies that Williams' claim that the modifications cause Option 23 to be dominated by a single service, international, is wrong. AT&T Reply at 1-2. AT&T maintains that, contrary to Williams' assertions, the tariff revisions at issue here have no effect on the amount of international usage because the revisions modify domestic rates only. *Id.* at 2-3 (also claiming that the increase in the international traffic is attributable to an order placed by a second customer for Option 23 as currently effective). Further, says AT&T, contrary to Williams' assertions, VTNS options are not integrated simply because they contain particular percentages of individual service elements or transmission capabilities, but because they provide, under a single set of rates, terms, and conditions, multiple complementary communications capabilities and a number of functionalities unavailable under individual service tariffs. *Id.* at 2.

6. AT&T further contends that assertions by Williams that the modifications to Option 23 render the option unprofitable and, therefore, discriminatory, are wrong and based upon a misleading financial analysis. *Id.* at 4. In response to Williams' contentions of discrimination, bundling," likeness" among options, resale restrictions, and lack of general availability, AT&T maintains that the claims have been raised without success in previous VTNS filings and insists that these contentions are patently without merit. *Id.* at 5. AT&T also insists that the Court of Appeals decision creates no basis to reject or suspend new or revised VTNS offerings and notes that the Commission has issued several orders denying petitions to reject, suspend or investigate VTNS options since the release of the *Tariff 12 Remand*. *Id.* at 6. Therefore, AT&T asserts that the most the Commission should do is make Option 23 subject to the outcome of the remand proceeding. *Id.* at 6-7.

[1] See *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*).

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3144, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although Transmittal 3144 does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket 87-568 remand proceedings. Therefore, Transmittal 3144 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

9. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3144 filed by Williams Telecommunications Group, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3138

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: August 6, 1991; Released: August 8, 1991

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3138 to modify Virtual Telecommunications Network Service (VTNS) Option 7, under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 7: reduce the basic charge from $2,512,300 to $2,431,781 per month; introduce a promotional reduction of the basic charge of $303,156 per month for the first three full months of service; modify the service elements included in the basic charge; decrease the minimum annual charge; modify the outage credit units; modify the change charges provisions; and make certain textual changes. *See* AT&T Transmittal No. 3138 Description and Justification (D&J) at 2-5. The transmittal is scheduled to take effect on August 11, 1991.

2. Williams Telecommunications Group, Inc. (Williams), filed a petition to reject or suspend and investigate the Option 7 modifications, or to provide alternative relief, on June 12, 1991. AT&T filed a reply on June 21, 1991.

3. Williams contends that the Option 7 modifications raise the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand*[1] and must be reviewed in light of the remand. Williams Petition at 2-3. Williams argues that AT&T has failed to demonstrate that Option 7 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 7 and AT&T's other services. *Id.* at 3-8. Williams further alleges that even if Option 7 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and thus are discriminatory. *Id.* at 8-10.

4. Williams contends that modified Option 7 is not generally available and that it violates the Commission's policy against geographic rate deaveraging. *Id.* at 10-12, 13. Williams also charges that the modifications to Option 7 feature anticompetitive bundling of AT&T's 800 service with other services, thereby allowing AT&T to take advantage of the lack of number portability and effectively preclude a customer from leaving AT&T. *Id.* at 13-16.

5. AT&T replies that no change has been made to the basic structure of Option 7, which remains as it was when initially reviewed by the Commission over a year ago. AT&T Reply at 1. AT&T asserts that Williams' petition does not address the revisions to Option 7, but rather restates its objections to VTNS options generally, as it did in opposing the initial filing of Option 7 and virtually every other VTNS filing. *Id.* at 2 (also insisting that claims by Williams that Option 7 is not integrated are erroneous since nothing in this filing alters the structure of Option 7).

6. In response to Williams' claims of discrimination, bundling," likeness" among options, lack of general availability, and geographic rate deaveraging, AT&T maintains that the claims have been raised without success in previous VTNS filings and insists that they are patently without merit. *Id.* at 2-3. AT&T also argues that the Court of Appeals decision creates no basis to reject or suspend new or revised VTNS offerings and notes that the Commission has issued orders allowing several additional VTNS Options to become effective since the release of the *Tariff 12 Remand*. *Id.* at 3-4. Therefore, AT&T asserts that the most the Commission should do is make Option 7 subject to the outcome of the remand proceeding. *Id.* at 4.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3138, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although Transmittal 3138 does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket 87-568 remand proceedings. Therefore, Transmittal 3138 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

9. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3138 filed by Williams Telecommunications Group, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

[1] *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 9, 1991

US WEST PETITION FOR WAIVER REGARDING COMMON CHANNEL SIGNALING (CCS/SS7)

Pleading Cycle Established

On August 1, 1991, US West Communications, Inc. (US West) filed a petition for waiver of Part 69[1] of the Commission's Rules to establish two new access rate subelements related to the provision of new common channel signaling (CCS) network-based services. US West states that the first of these rate subelements is a flat, monthly charge within the local transport rate element to recover the costs of the signaling transfer point (STP) port. It also states that the STP port, combined with two other network elements, a DS-1 circuit and STP central office connecting channel, will make up a new access capability called CCS access capability. US West asserts that with CCS access capability interexchange carriers will be able to interconnect their CCS networks with that of US West.

US West is also seeking waiver to establish CCS call set-up, a new per-call charge within the local switching category. It contends that this access rate subelement will recover those portions of the costs of the CCS central office hardware and software, each signaling link between the central office and the STP, and the STP switching fabric used for CCS call set-up.

Interested parties may file comments regarding US West petition for waiver no later than August 23, 1991. Reply comments may be filed no later than September 6, 1991.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the waiver petitions and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copy in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

[1] The petition seeks waiver of Sections 69.4, 69.106, 69.111, and 69.112, of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 9, 1991

GTE SERVICE CORPORATION FILE PETITION FOR WAIVER OF THE COMMISSION'S EQUAL ACCESS RULES ON BEHALF OF CONTEL TELEPHONE COMPANIES

[PLEADING CYCLE ESTABLISHED]

On July 24, 1991, the GTE Service Corporation, on behalf of its affiliated Contel Telephone Companies (Contel), filed a petition for waiver of the Commission's equal access rules to permit Contel to engage in modified procedures for notifying customers in four end offices being converted from an alternative equal access technology (LEAS) to a full equal access technology.

Contel instituted alternative equal access arrangements in 1988 because full equal access capability was not available in some Contel central offices. It advised the Commission that the LEAS system would be phased out and eventually replaced with a full equal access system. In the March 1989 Order, the Commission granted Contel a waiver of the Rules to permit an alternative access arrangement. The waiver was granted under the condition that Contel would reballot affected customers when full equal access was provided.[1]

Contel states that it is now preparing to implement a full capability equal access system in four end offices so that these office will now have 10XXX dialing. Contel Petition at 2. Contel also proposes to notify end users in these office by direct mail of the additional calling capabilities available upon conversion to the new digital switching technology. *Id.* at 2. It seeks a waiver of the reballoting requirement set out in the 1989 Order.

Interested parties should file comments regarding the GTE petition no later than August 23, 1991. Reply comments should be filed no later than September 6, 1991.

An original and four copies of all comments and replies must be filed, with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. In addition, parties must also furnish one copy of their comments and replies to the Downtown Copy Center (DCC), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the GTE Service Corporations' waiver petition may be obtained from DCC. The petition is also available for public inspection and copying in Room 518, 1919 M Street, N.W.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

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[1] *See* Contel Service Corporation, CC Docket No. 88-287, *Memorandum Opinion and Order*, 4 FCC Rcd 2565 (Com. Car. Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-91-146

Application for authority to acquire and operate facilities in the Private Transatlantic Telecommunications Cable System for the provision of authorized common carrier service to the United Kingdom and beyond.

ORDER AND AUTHORIZATION

Adopted: August 7, 1991; Released: August 15, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 14, 1991 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom (U.K.), and points beyond. The application was placed on public notice on June 26, 1991. No comments were received.

2. AT&T is a common carrier engaged in the provision of interstate and foreign communications services. AT&T currently provides services to the U.K. via various satellites and cables now in existence, and proposes to supplement these facilities by use of the capacity in the PTAT-1 Cable System. AT&T has been authorized to acquire and operate a one-half interest in 72 E-1 circuits[1] in the PTAT-1 cable for service between the U.S. and the U.K.[2] It now proposes to acquire, from Private Transatlantic Telecommunications System, Inc. (PSI), on and Indefeasible Right of User (IRU) basis, an additional one-half interest in 21 E-1 circuits in the PTAT-1 cable for service to the U.K. For each of the IRU half-interests, AT&T will pay not more than $720,000 plus annual operations and maintenance charges of approximately $25,000.

3. The Commission stated in its *Private Submarine Cable Decision* [3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] Most recently, on August 22, 1989[5], we granted authority to six common carriers to acquire capacity in the PTAT-1 cable and to use this capacity to provide their authorized common carrier services between the United States and Bermuda, the Republic of Ireland, the U.K., and points beyond. We found that those applicants had provided all the information necessary for grant of the applications.[6] In addition, we found that the circumstances surrounding those applications did not raise an economic impact issue.[7] In the instant application, we find that AT&T's request fits into the same category as the above referenced applications granted on August 22, 1989. AT&T has filed all the information necessary under Section 63.01 of the Commission's Rules. Furthermore, AT&T states that it will be using the capacity in PTAT-1 to supplement existing facilities and the grant of this application will not adversely inpact other common carrier facilities for which AT&T has already been authorized.

4. Upon consideration of the application, we find that authorization of the requested services and facilities are required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-91-146 IS GRANTED, and AT&T is authorized to:

a. acquire, on an IRU basis, a one-half interest in 21 E-1 circuits in the PTAT-1 cable between the United States and the U.K.;

b. acquire appropriate domestic connecting facilities; and

c. operate such capacity for the provision of AT&T's authorized services between the U.S. and the U.K. and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 Megabits per second (Mbps).

[2] *See* AT&T, 4 FCC Rcd 7005 (1989), 5 FCC Rcd 2593 (1990) and 6 FCC Rcd 732 (1991).

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] *See*, CICI, Inc. *et al*, File Nos. I-T-C-89-103 *et al.*, 4 FCC Rcd 6622 (1989).

[6] The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[7] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-91-148

Application for authority to acquire and operate facilities for service between the U.S. and Malawi and Zambia

Application for authority to acquire and operate facilities for service between the U.S. and Ethiopia, Gabon, Gambia and Sierra Leone. File No. I-T-C-91-156

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 7, 1991; Released: August 15, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Malawi, Zambia, Ethiopia, Gabon, Gambia and Sierra Leone by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-91-148 and I-T-C-91-156 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 64 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Ethiopia, Gabon, Gambia and Sierra Leone furnished by MCI's correspondents in Ethiopia, Gabon, Gambia and Sierra Leone;

b. own and operate 64 voice-grade circuits in the Andover, Maine earth station and the connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center;

c. use said facilities in a and b above to provide MCI's regulaly authorized services between the U.S. and Ethiopia (36 circuits) Gabon (10 circuits), Gambia (12 circuits) and Sierra Leone (six circuits) and beyond;

d. lease from Comsat and operate 16 voice-grade satellite circuits between the Etam, West Virginia earth and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Malawi and Zambia furnished by MCI's correspondents in Malawi and Zambia;

e. lease from AT&T and operate 16 voice-grade circuits in the Etam, West Virginia earth station;

f. lease and operate 16 voice-grade connecting circuits between the Etam, West Virginia earth station and MCI's West Orange, New Jersey operating center; and

g. use the facilities in d, e and f above to provide MCI's regularly authorized services between the U.S. and Malawi (eight circuits) and Zambia (eight circuits) and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

For a Construction Permit
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1991; Released: August 15, 1991

By the Commission:

1. On March 29, 1991, Garden State Broadcasting Limited Partnership ("Garden State") filed a Petition for Reconsideration of the *Memorandum Opinion and Order*, FCC 91-65, released March 4, 1991 ("*Order*") in which the Commission set aside the *Partial Initial Decision of Administrative Law Judge Richard L. Sippel*, 6 FCC Rcd 131 (1991). The Commission received the *Mass Media Bureau's Opposition to the Petition for Reconsideration* on April 11, 1991. Garden State filed its reply on April 23, 1991.

2. Section 1.106(a)(1) of the Commission's Rules states, in relevant part, "A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. **Petitions for reconsideration of other interlocutory actions will not be entertained"** (emphasis added).

3. A remand for further hearings, not finally resolving the disposition of this proceeding, is interlocutory in nature; as such Garden State's petition for reconsideration is clearly unauthorized. It is thus unnecessary and inappropriate to address Garden State's petition any further.[1]

4. ACCORDINGLY, IT IS ORDERED, That Garden State's March 29, 1991 Petition for Reconsideration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Throughout its petition, Garden State mischaracterizes the *Order* as setting forth "conclusions" contrary to findings made by the ALJ. While the *Order* identified concerns with respect to certain conclusions drawn by the ALJ, the Commission did not specifically reverse any findings set forth in the partial initial decision. Rather, the Commission reopened the proceeding to obtain additional evidence that the Commission deemed necessary to support any determination that Garden State did not file its application for an improper purpose. Garden State will have ample opportunity to present its arguments before the ALJ, with the full benefit of Commission review in accordance with paragraph 14 of the *Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-343

In re Applications of

Francisco Resto Torres d/b/a NAGUABO BROADCASTING COMPANY	File No. BPH-861023MA
JORGE G. BLANCO GALDO	File No. BPH-861027ME
REYES RUIZ RIVERA	File No. BPH-861027MF
HECTOR NEGRONI CARTEGENA	File No. BPH-861027MH
EFRAIN ARCHILLA-DIEZ	File No. BPH-861027MI

For Construction Permit for
New FM Station, Channel 225A,
Naguabo, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1991; Released: August 15, 1991

By the Commission:

I. INTRODUCTION

1. Before the Commission is a Review Board decision granting the application of Efrain Archilla-Diez (Archilla) for a new FM radio station in Naguabo, Puerto Rico, and denying the mutually exclusive applications of Naguabo Broadcasting Company (NBC), Reyes Ruiz Rivera (Ruiz), and Hector Negroni Cartagena. *Naguabo Broadcasting Co.*, 6 FCC Rcd 912 (Rev. Bd. 1991), *affirming*, 5 FCC Rcd 2062 (I.D. 1990). The losing parties seek review of the Board's decision.[1] We agree with the Board's resolution of this case and will deny review. However, we will modify the Board's decision in certain respects.

II. BACKGROUND

2. In this proceeding, the Board (affirming an initial decision by now Chief Administrative Law Judge Joseph Stirmer) found that Archilla had a decisive preference over NBC for integration of ownership into management. The Board eliminated the other two applicants from comparative consideration because Negroni failed to justify a waiver of 47 C.F.R. § 73.315, the principal community coverage rule, and Ruiz failed to obtain a waiver of 47 C.F.R. 73.207, the minimum spacing rule. (Archilla and NBC, which were short-spaced to a lesser extent than Ruiz, received a waiver of 47 C.F.R. § 73.207.) Because both Archilla and NBC proposed 100 percent full-time integration, Archilla's advantages for local residence, civic participation, and broadcast experience were decisive. (The Board held that Archilla also had an integration advantage over Ruiz.) The Board declined to add abuse of process[2] and misrepresentation [3] issues against Archilla.

III. DISCUSSION

3. The losing applicants in this proceeding raise various objections to the Board's decision. In most respects we find that the Board has dealt with the relevant matters adequately and no further discussion on our part is needed. Ruiz, however, has raised questions concerning the Board's treatment of its application that merit our attention.

4. These questions arise from the technical aspects of the applicants' proposals. As noted in the hearing designation order in this proceeding, terrain obstructions limit the availability of transmitter sites that cover Naguabo with a 70 dBu signal (3.16 mV/m) as required by 47 C.F.R. § 73.315. *Naguabo Broadcasting Co.*, 3 FCC Rcd 4634 ¶¶ 3-4 (Mass Med. Bur. 1988). Consequently, all of the applicants in this proceeding have proposed sites that are short-spaced to some degree with co-channel station WTPM(FM) in Aguadilla, Puerto Rico. The provisions of 47 C.F.R. § 73.207 in effect when the Naguabo applications were filed require a Naguabo facility to be 163 km from WTPM(FM). The record indicates that the Negroni proposal would be short-spaced by 1.56 km (an amount the Commission considers *de minimis* [4], that the NBC and Archilla proposals (using the same site) would be short-spaced by 3.01 km, and that the Ruiz proposal would be short-spaced by 3.35 km. Blanco Exh. 7, Att. H.

5. To justify short-spacing, an applicant must make a threshold showing that (1) no suitable fully-spaced site is available and (2) that the site proposed is the least short-spaced of the suitable sites available. *See, e.g., Megamedia*, 67 FCC 2d 1527, 1528 ¶ 4 (1978). After rejecting Negroni's site as unsuitable because of a coverage problem,[5] the Board held that NBC and Archilla had made a threshold showing[6] but that Ruiz had not, since the less short-spaced site proposed by NBC and Archilla was available. The Board recognized that the slight difference in short-spacing between the Ruiz site and that proposed by NBC and Archilla (0.34 km) made this a close question. 6 FCC Rcd at 915 ¶ 12. Nonetheless, the Board believed that the spacing rule should be strictly applied.

6. Ruiz, however, points out that the Board's treatment of the short-spacing issue fails to address a pertinent provision of the rules. Under the rules, the spacing of broadcast facilities is computed using the method prescribed by 47 C.F.R. § 73.208. This section provides that the distances computed are rounded off to the nearest kilometer. 47 C.F.R. § 73.208(c)(8).[7] *See Stearns County Broadcasting Co.*, 71 FCC 2d 412 (1979) (an applicant could comply with a then-applicable 65 mile spacing requirement by proposing a site spaced 64.51 miles.); *Brown Broadcasting Service, Inc.*, 59 FCC 2d 167, 169 ¶ 6 (1976).[8] Thus, under the plain language of the rule, Ruiz can claim a short-spacing of 3 km, which is equal to that of the NBC and Archilla proposals. Ruiz has, therefore, also made an adequate threshold showing.

7. Our disagreement with the Board on this point does not change the outcome of the case. We agree with the ALJ and the Board that, even if Ruiz is entitled to comparison with Archilla, Archilla has a decisive advantage over Ruiz for integration of ownership into management.[9] Both Archilla and Ruiz claim 100 percent integration credit for their proposals to be integrated full-time as general managers of their respective stations. 5 FCC Rcd at 2064 ¶ 19, 2066 ¶ 36. Ruiz, however, intends to retain ownership of two profitable outside business ventures, a gas station and a sound equipment company to which Ruiz presently devotes 30-40 hours a week. *Id.* at 2064-65 ¶¶ 20-22. Ruiz' intentions in this regard bear on the reliability of his proposal. As we recently reemphasized, we believe that it is appropriate to carefully scrutinize the reliability of an applicant's integration proposal. *See Royce International Broadcasting*, 5 FCC Rcd 7063, 7063 ¶¶ 4-7 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991).

8. We agree with the ALJ and the Board that Ruiz has not set forth a specific credible plan for accommodating these outside interests with his plan for full-time integration. 6 FCC Rcd at 924 n.63; 5 FCC Rcd at 2084 n.31. *See Bradley, Hand, and Triplett*, 89 FCC 2d 657, 660-61 ¶ 4 (Rev. Bd. 1982). Such a showing is necessary because the "very existence" of outside interests renders an applicant's commitment questionable. *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 ¶ 7 (Rev. Bd. 1969). We find the need for a detailed accounting of duties and time particularly compelling in this case, since the interests here readily lend themselves to Ruiz dividing his time freely between them. We note that Ruiz lives behind his service station and may locate the radio station there. We also note that Ruiz' sound equipment business is essentially a one-man operation, in which Ruiz lines up jobs and hires independent contractors to perform them. 6 FCC Rcd at 924 n.63; 5 FCC Rcd at 2064 ¶ 21, 2084 n.31. Ruiz' failure to show more explicitly, under these circumstances, how each business would operate independently in the future undermines the credibility of Ruiz' claim that simply by hiring additional employees he will alleviate the need or temptation for him to participate substantially in those other businesses to the detriment of his proposed full-time integration. Thus, we agree with the ALJ and the Board that Ruiz has not supported his claim for full-time integration credit.

9. In any event, even if the Archilla and Ruiz proposals were considered quantitatively equal, Archilla's qualitative advantages for local familiarity and broadcast experience would prevail. Ruiz has longer service area residence than Archilla (34 years vs. 17 years). 5 FCC Rcd at 2064 ¶ 18, 2066 ¶ 37. The significance of this disparity is diminished, however, because Ruiz' residence includes his years as a child and adolescent. *See Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 187 ¶ 33 (Rev. Bd. 1986). These years were also remote in time (and broken by the four years Ruiz spent in college) and are thus of limited significance in assessing Ruiz' current familiarity with the local area. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 ¶ 10 (1991). Although both Archilla and Ruiz claim civic participation, Ruiz' activities consist mainly of fundraising for organizations of which he is not a member, as compared with Archilla's more significant participation. 5 FCC Rcd at 2065 ¶ 23, 2067 ¶¶ 43-45, 2084 n.31. Accordingly, on balance, Archilla has an advantage for local familiarity. *See Ronald Sorenson*, 6 FCC Rcd 1952, 1952-53 ¶ 5 (1991). Moreover, Archilla, unlike Ruiz, has extensive broadcast management experience. 5 FCC Rcd at 2065 ¶ 24, 2066-67 ¶¶ 40-43.[10]

IV. ORDERS

10. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Reply filed April 18, 1991 by Hector Negroni Cartegena IS DENIED;[11] and the Applications for Review filed March 21, 1991 by Naguabo Broadcasting Company and Hector Negroni Cartegena, and March 22, 1991 by Reyes Ruiz Rivera ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

11. IT IS FURTHER ORDERED, That the Decision of the Review Board FCC 91R-10 (Feb. 19, 1991), 6 FCC Rcd 912 IS MODIFIED as set forth above.

12. IT IS FURTHER ORDERED, That the application of Efrain Archilla-Diez for a new FM radio station in Naguabo, Puerto Rico (File No. BPH-861027MI) IS GRANTED and the applications of Naguabo Broadcasting Company (File No. BPH-861023MA), Reyes Ruiz Rivera (File No. BPH-861027MF), and Hector Negroni Cartegena (File No. BPH-861027MH) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) Applications for Review filed March 21, 1991 by NBC and Negroni, and March 22, 1991 by Ruiz; (2) oppositions filed March 29, 1991 by the Mass Media Bureau, April 5, 1991 by Archilla and Ruiz, and April 8, 1991 by NBC; and (3) a reply and a motion for leave to file reply filed April 18, 1991 by Negroni and an opposition filed April 26, 1991 by Archilla. An additional applicant, Jorge G. Blanco Galdo (File No. BPH-861027ME), did not file an application for review and thus the Board's denial of his application is final.

[2] 6 FCC Rcd at 920-21 ¶¶ 33-37.

[3] 6 FCC Rcd at 924 n.54. For reasons more fully explained by the ALJ in FCC 89M-1633 (Jun. 13, 1989), we find no support for allegations that Archilla's account of his reasons for filing a November 9, 1987 amendment were materially inaccurate or deceptive.

[4] *See Kenter Broadcasting Co.*, 62 RR 2d 1573, 1577 n.9 (1986).

[5] The record indicates that Negroni's transmitter would not provide the requisite 70 dBu signal to any part of Naguabo. 5 FCC Rcd at 2069 ¶ 65. Although Negroni proposes to provide a 70 dBu signal to Naguabo using a translator or booster, the Commission expects coverage of the principal community to be provided primarily by the main transmitter, and does not permit proposals such as Negroni's. *See PZ Entertainment Partnership, L. P.*, 6 FCC Rcd 1240, 1243 ¶¶ 14-15 (1991). Following the close of the record, Negroni sought to amend his transmitter site. He did not, however, demonstrate good cause for this untimely and disruptive amendment. 6 FCC Rcd at 916-17 ¶¶ 18-22.

[6] The uncontroverted testimony of the engineeering witnesses established that no suitable fully-spaced site is available. 5 FCC Rcd at 2078 ¶¶ 122-23.

[7] Earlier versions of the rule specified the same procedure using slightly different language: "sufficient decimal figures must be used to determine the distance to the nearest kilometer." 47 C.F.R. § 73.208(c) (1986).

[8] *Corydon Broadcasters, Ltd.*, 2 FCC Rcd 7521, 7522 ¶ 12 (Mass Med. Bur. 1987), cited by Archilla, is not apposite, since that ruling does not take the rounding-off provision into account.

[9] None of the applicants has media interests cognizable under the diversification criterion. Archilla made a timely, clear, and effective pledge to sever "all connections" with station WALO in Humacao, Puerto Rico (owned by Archilla's father), at which he currently serves as vice president, treasurer, and general manager. *See* Petition for Official Notice or Alternatively to Reopen the Record and Receive Evidence filed October 29, 1990 by NBC, Exhs. C, D; Archilla Exh. 1, Att. 1. Archilla's status as an occasional technical consultant to station WAMA in Tampa, Florida (also owned by Archilla's father) is not a cognizable interest. 6 FCC Rcd at 921 ¶ 39; 5 FCC Rcd at 2084 n.29.

[10] Both Ruiz and NBC have small comparative coverage advantages over Archilla. 5 FCC Rcd at 2067 ¶¶ 48-49. However, we agree with the ALJ that these small preferences for covering already well-served areas are not as important as Archilla's preferences for the qualitative aspects of its integration proposal. *See Jarad Broadcasting Co.*, Inc., 1 FCC Rcd 181, 190 ¶ 49 (Rev. Bd. 1986).

[11] Good cause has not been shown for entertaining a reply. *See* 47 C.F.R. § 1.115(d). The matters dealt with in the reply have already been adequately presented to the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NATIONAL BROADCASTING
COMPANY, INC.
Transferor

and File No. BTCCT-900402KE

MULTIMEDIA, INC.
Transferee

For Consent to the Transfer
of Control of the Licensee of
Television Station WKYC-TV,
Cleveland, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1991; Released: August 16, 1991

By the Commission:

1. The Commission has before it for consideration: (1) the December 24, 1990 decision of the Chief, Video Services Division approving the transfer of control of WKYC-TV, Cleveland, Ohio, from National Broadcasting Company, Inc. (NBC) to Multimedia, Inc. (Multimedia)(collectively referred to as Applicants) over the objections of the American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO (AFTRA) and the National Association of Broadcast Employees and Technicians (NABET); (2) an application for review filed by AFTRA;[1] and (3) a joint opposition filed by NBC and Multimedia.

2. Prior to the transfer of control, NBC owned all of the voting stock in NBC Subsidiary (WKYC-TV) Inc. (NBC Subsidiary). The transfer of control was accomplished in a two-step process. NBC transferred control of NBC Subsidiary, the licensee of WKYC-TV, to Multimedia. The license for WKYC-TV was then transferred to a new corporation, WKYC-TV Holdings, Inc. (Holdings). Multimedia received 100% of Holdings' voting stock, representing 51% of the equity, and NBC obtained nonvoting stock, representing 49% of the licensee's equity, which NBC can, at its option, convert into voting stock within one year from the sale of the station to Multimedia. In its decision, the staff concluded that: (1) the 49% interest retained by NBC in the licensee is nonattributable under the Commission's rules and policies concerning attribution of ownership interests because, although NBC could convert its stock to voting stock in the future, it is presently nonvoting stock; (2) even if NBC converts its stock to voting stock, its 49% interest would remain a nonattributable one under the attribution policy because Multimedia would remain a single majority shareholder; (3) AFTRA and NABET did not establish a *prima facie* case that NBC would dominate management of the corporate affairs of WKYC-TV Holdings because of its veto power with respect to the specified business transactions set forth in the Shareholders Agreement between NBC and Multimedia; (4) NABET did not submit a proper affidavit in support of, nor did it establish, a *prima facie* case that the transfer of control would be anticompetitive; (5) AFTRA did not make a *prima facie* case that the transfer violated the Commission's financial interest and syndication rule; and (6) AFTRA's allegations concerning the collective bargaining aspects of the purchase agreement between NBC and Multimedia relate to matters that are more appropriately resolved in other forums.

3. In its application for review, AFTRA reiterates the arguments it made previously in its petition to deny. AFTRA argues that NBC's 49% equity interest in the licensee of station WKYC-TV must be attributed to NBC under the Commission's attribution policy because NBC will undoubtedly convert its stock to voting stock when its option to do so becomes available. Further, in this regard, AFTRA notes that NBC is not a small, passive stockholder, but rather a major network with a sophisticated business and legal acumen and has the power to veto certain material matters affecting WKYC-TV. Thus, AFTRA argues that NBC could potentially make programming decisions for the licensee. Next, AFTRA asserts that the transfer of control violates Commission rules regarding network control of the affiliation of a station for an unreasonably long time. AFTRA also states that NBC's potential ownership of broadcast stations that exceed the number and audience reach permitted by the Commission is anticompetitive. Finally, AFTRA indicates that as a result of the subject transfer of control, NBC, a network, potentially could acquire a financial interest in shows produced by Multimedia, an independent producer and syndicator, such as *The Phil Donahue Show* and *Sally Jesse Raphael*, if those shows are aired on WKYC-TV in the future, in violation of the Commission's financial interest and syndication rules.

DISCUSSION

4. We affirm the staff's conclusion that NBC's 49% nonvoting stock interest in the licensee is nonattributable. As correctly noted by the staff, the nonvoting stock, even if convertible to voting stock, is nonattributable because, by its nature, it precludes the means to influence or control the activities of the issuing corporation unless and until it is converted to voting stock. *Attribution of Ownership Interests*, 97 FCC2d 997, 1020 and 1021 (1984), *reconsidered in part*, 58 RR2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986) (*Attribution*). Moreover, under the existing division of stock interests, even were NBC to convert its shares to voting stock, it would still not obtain an attributable interest in WKYC-TV Holdings because Multimedia would remain a single ma-

[1] In its opposition to AFTRA's application for review, the Applicants assert that AFTRA has not demonstrated appropriate grounds to support its filing of the application for review, as set forth in Section 1.115(b)(2) of the Commission's Rules. We disagree. AFTRA has specified with particularity how it believes the staff's action conflicts with Commission regulations and case precedent. Thus, AFTRA's application for review meets the requirements of Section 1.115(b)(2) of the Rules.

jority shareholder. *See Attribution*, 97 FCC2d at 1008. We also agree with the staff that the record does not make a *prima facie* case that NBC will dominate management of the corporate affairs of WKYC-TV Holdings, including programming decisions. As the staff noted, the Shareholder's Agreement set forth all of the corporate actions which would require NBC's consent and none of the specified prerogatives, separately or together, constitute impermissible control by NBC.[2] Indeed, we have previously found all of these actions to be of such a nature as not to constitute a controlling interest. *See e.g., News International, PLC*, 97 FCC2d 349, 356 (1984); *Data Transmission Co.*, 44 FCC2d 935, 936-37 (1974); and *Attribution*, 97 FCC2d at 1022. Moreover, the fact that a network holds the minority interest is of no consequence under the attribution rules. In *Attribution*, no special provisions regarding networks were adopted. 97 FCC2d at 1032.[3] In any event, NBC's interest in WKYC-TV, whether attributable, nonattributable, or controlling does not present a violation of the Commission's twelve-station rule under the circumstances of this case.

5. To the extent that AFTRA claims that the transfer of control violates a Commission rule against prolonged network control of an affiliate, we note that no such rule presently exists. *Network Broadcasting By Television Stations*, 4 FCC Rcd 2755 (1989). Thus, there is no rule violation upon which adverse action could be premised.

6. Based on its contention that NBC will continue to control the station, AFTRA asserts that NBC might in the future violate our multiple ownership rule by acquiring more than a permissible number of broadcast stations. AFTRA also asserts that NBC could potentially violate our financial interest and syndication rule by acquiring programs produced by Multimedia. We note that NBC's interest is in Holdings, not in Multimedia's production business. In any event, we find AFTRA's allegations to be speculative and hypothetical. Thus, we reject these arguments because they fail to address actual or present violations of our rules or policies. If NBC violates any rule or policy in the future or assumes *de facto* control, we will take any necessary action at that time.

7. Based on the foregoing, we find that AFTRA has failed to demonstrate that the staff erred in granting the captioned transfer of control application. Accordingly, IT IS ORDERED, That the action of the Chief, Video Services Division, granting the transfer of control of WKYC-TV from National Broadcasting Company, Inc. to Multimedia, Inc. IS AFFIRMED, and the application for review filed by the American Federation of Television and Radio Artists, Cleveland Local, IS DENIED.

8. IT IS FURTHER ORDERED, That the Mass Media Bureau shall mail copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[2] Those actions are: (1) amendment of the Certificate of Incorporation of WKYC Holdings or the licensee; (2) sale of essentially all of the assets of WKYC Holdings or the licensee; (3) dissolution of WKYC Holdings or the licensee; (4) acquisition or merger with another corporation; (5) incurring specified indebtedness, mortgages and loans not in the ordinary course of WKYC-TV's operations; and (6) delegation of authority to approve any of the foregoing.

[3] The staff is correct that to the extent AFTRA disagrees with the policies adopted in *Attribution*, those arguments are better made in the context of a rulemaking proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3188

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: August 8, 1991; Released: August 12, 1991

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3188 to modify Virtual Telecommunications Network Service (VTNS) Option 25, under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The modifications to Option 25: increase the basic charge from $379,000 per month to $394,800 per month; modify the language of rate schedules B and D; modify the domestic usage volume pricing plan; introduce an international usage volume pricing plan; remove the ability to increase the minimum annual charge in exchange for an additional discount applicable to measured charges; introduce change charges for data transmission capabilities (DTC) with speeds between 64 kbps and 768 kpbs, inclusive; modify the outage credit units and credit allowance; and modify the DTC volume pricing plan by expanding the plan to cover additional speeds of DTC network components. *See* AT&T Transmittal No. 3188 Description and Justification at 2. The transmittal is scheduled to take effect on August 13, 1991.

2. Williams Telecommunications Group, Inc. (Williams), filed a petition to reject or suspend and investigate the Option 25 modifications on July 1, 1991. AT&T filed a reply on July 11, 1991.

3. Williams contends that the Option 25 modifications raise the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand*[1] and must be reviewed in light of the remand. Williams Petition at 2-3. Williams argues that AT&T has failed to demonstrate that Option 25 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 25 and AT&T's other services. *Id.* at 3-8 (also claiming that these revisions cause Option 25 to be dominated by a single service). Williams further alleges that even if Option 25 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and thus are discriminatory. *Id.* at 8-11 (also arguing that these revisions remove a customer's incentive to increase usage of Option 25 and emasculate any resale effort on the part of the customer).

4. Williams also claims that the revisions to Option 25 feature anticompetitive bundling of 800 service with other Tariff 12 services, thereby allowing AT&T to take advantage of the lack of number portability and effectively preclude a customer from leaving AT&T. *Id.* at 11-14. Williams contends that modified Option 25 violates the Commission's policy against geographic rate deaveraging, that it is not generally available, and that it does not comply with the Commission's *Private Line Guidelines*. *Id.* at 14-16. Williams also argues that, at the very least, the modifications to Option 25 ought to take effect subject to the outcome of the *Tariff 12 Remand* proceedings. *Id.* at 17.

5. AT&T replies that Option 25 continues to be an integrated services offering that includes discount plans that provide customers incentives to increase their usage of the option. AT&T Reply at 2, 3-4. AT&T insists that VTNS options are not integrated simply because they contain particular percentages of individual service elements or transmission capabilities, but because they are customized networks which are provisioned differently from individually tariffed services and in which AT&T provides and customers obtain multiple complementary communications capabilities and functionalities unavailable under individual service tariffs. *Id.* at 2-3. AT&T further replies that nothing in the revisions in any way precludes resale, contrary to Williams' assertions. *Id.* at 4.

6. In response to charges of discrimination, anticompetitive bundling, "likeness" among options, lack of general availability, and geographic rate deaveraging, AT&T maintains that these claims have been raised without success in previous VTNS filings and insists that they provide no basis for any different treatment of the revisions to Option 25. *Id.* at 45. AT&T also insists that the Court of Appeals decision creates no basis to reject or suspend new or revised VTNS offerings and notes that the Commission has issued several orders allowing VTNS Options to become effective since the release of the *Tariff 12 Remand*. *Id.* at 5. Therefore, AT&T asserts that the most that the Commission should do is make Option 25 subject to the outcome of the remand proceeding. *Id.* at 6.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3188, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although Transmittal 3188 does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket 87-568 remand proceedings. Therefore, Transmittal 3188 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

[1] See *MCI Telecommunications Corp. v. FCC*, 917 F. 2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*).

9. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3188 filed by Williams Telecommunications Group, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-162

In the Matter of

Kansas Public Safety Plan

ORDER

Adopted: August 8, 1991; Released: August 16, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On March 12, 1991, Region 16 (Kansas) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Kansas. On May 20, 1991, Kansas filed revisions to the plan, based on conversations with the Commission's staff.

2. The Kansas plan was placed on Public Notice for comments on June 12, 1991, FR 28155 (June 19, 1991). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Kansas and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Kansas.

4. Therefore, we accept the Kansas Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Kansas may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

Global Communications, Inc.
for assignment of public
coast station call letters
WCT.

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1991; Released: August 16, 1991

By the Chief, Special Services Division, Private Radio Bureau:

1. On April 9, 1991, Global Communications, Inc. (Global), of San Juan, Puerto Rico, filed a Petition for Assignment of Public Coast Station Call Letters (Petition). For reasons discussed below, this Petition is denied.

2. In its Petition, Global requests authority to use the three letter call sign WCT. WCT was previously assigned to an AT&T public coast station in the same area that was authorized to discontinue service by the Commission's Common Carrier Bureau on March 19, 1991, DA 91-304. Global argues that in the interest of public safety, it should be able to use the call sign WCT so that recognition and memory of the call sign will assist boaters in need of the services offered by its station.

3. Global's request is for a three-letter call sign, specifically WCT. In accordance with Section 2.302 of the Commission's Rules, 47 C.F.R. § 2.302, however, the Commission assigns three-letter call signs only to public coast stations with high frequency assignments and, typically, world-wide operations. At present, Global's coast station, call sign KMD 214, is licensed only for VHF transmissions and provides local coverage.

4. In light of the discussion above, we determine that granting a three-letter call sign to the type of coast station proposed by Global would be contrary to the call sign designations set forth in Section 2.302 of the Commission's Rules.

5. Accordingly, IT IS ORDERED THAT pursuant to Section 303(o) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(o), the Petition for Assignment of Public Coast Station CALL Letters WCT filed by Global Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-505

In the Matter of

National Security Emergency
Preparedness Telecommunications
Service Priority System

Ameritech Transmittal No. 464
Operating Companies
Revisions to Tariff F.C.C. No. 2

Bell Atlantic Transmittal No. 379
Telephone Company
Revisions to Tariff F.C.C. No. 1

BellSouth Transmittal No. 327
Telephone Companies
Revisions to Tariff F.C.C. No. 4

Cincinnati Bell Transmittal No. 574
Telephone Company
Revisions to Tariff F.C.C. No. 35

New England Transmittal No. 1083
Telephone Company
Revisions to Tariff F.C.C. No. 40

New York Transmittal No. 1073
Telephone Company
Revisions to Tariff F.C.C. No. 41

Pacific Bell Transmittal No. 1491
Revisions to Tariff F.C.C. No. 1

Southern New England Transmittal No. 520
Telephone Company
Revisions to Tariff F.C.C. No. 39

Southwestern Bell Transmittal No. 2013
Telephone Company
Revisions to Tariff F.C.C. No. 68

US West Transmittal No. 97
Communications, Inc.
Revisions to Tariff F.C.C. Nos. 1, 3

American Telephone Transmittal No. 2491
and Telegraph Company
Revisions to Tariff F.C.C.
Nos. 9, 11, 12, and 16

ORDER

Adopted: August 8, 1991; Released: August 19, 1991

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In 1988, the Commission replaced its Restoration Priority (RP) system and rules, which specify priority for restoration of service vital to national security in the event of an outage. The new system was named the Telecommunications Service Priority (TSP) and was to be phased in over a 30-month period beginning September 10, 1990.[1] The *TSP Order* requires carriers to file tariffs for their charges for TSP treatment in compliance with the Communications Act and the Commission's Rules.[2]

2. On August 6, 1990, Aeronautical Radio, Inc. (ARINC) filed a petition to reject or, in the alternative, to suspend and investigate, the Ameritech Operating Companies' (Ameritech) Transmittal No. 464, establishing terms, rates, and conditions for introduction of the TSP system. ARINC filed similar petitions against the TSP tariffs of nine other local exchange carriers (LECs) on August 13, 1990,[3] and American Telephone and Telegraph Company's (AT&T) TSP tariff on August 27, 1990. These tariffs became effective on September 10, 1990.

II. SUMMARY OF PLEADINGS

A. Demand Estimates

3. ARINC asserts that the LECs have underestimated demand and set unreasonable rates.[4] ARINC accuses the LECs of basing their demand estimates on the Office of Management and Budget's (OMB) estimate of 25,000 services for Federal Government use, and ignoring 120,000 "non-Federal" services in OMB's analysis.[5] ARINC also notes that the OMB estimates are based on "services," and that a service may employ more than one circuit.[6] ARINC expects the number of priority circuits to increase under the TSP system because priority under the RP system was

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[1] National Security Emergency Preparedness Telecommunications Service Priority System, Gen. Docket No. 87-505, 3 FCC Rcd 6650 (1988) (*TSP Order*). *See* Section 64.401 of the Commission's Rules, 47 C.F.R. § 64.401; and Part 64, Appendix A of the Commission's Rules, 47 C.F.R. Part 64, App. A.

[2] *TSP Order*, 3 FCC Rcd at 6661.

[3] These LECs are the Bell Atlantic Telephone Companies (Bell Atlantic); The BellSouth Telephone Companies (BellSouth); New England Telephone and Telegraph Company (NET) and New York Telephone Company (NYT)(together, NYNEX); Pacific Bell; Southwestern Bell Telephone Company (SWB); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (together, US West); Cincinnati Bell Telephone Company (CBT); and Southern New England Telephone Company(SNET).

[4] ARINC August 13 Petition at 10-11; ARINC August 6 Petition at 4-5.

[5] ARINC August 6 Petition at 4-5.

[6] ARINC August 13 Petition at 12.

limited to intercity private line circuits.[7] ARINC also alleges that the LECs have underestimated switched TSP demand.[8]

4. Ameritech admits that it erred in computing its demand estimate, and revises its non-recurring charge from $180.00 to $100.00. However, Ameritech claims that the necessary revisions to its demand estimate do not affect other TSP rates.[9] Most LECs deny that their demand estimates are unreasonably low. CBT and Bell Atlantic contend that their demand estimates are more than double their demand under the RP system, and therefore cannot be understated.[10] Bell Atlantic also asserts that many of its customers plan to reduce TSP demand. [11] SNET claims it included part of the "non-Federal" demand of OMB's study in its demand estimate.[12] Other LECs claim they did not include this demand because it is intrastate demand.[13] Pacific Bell maintains it did not rely on OMB's estimate, and that most of its demand increase will be intrastate.[14] BellSouth contends it developed an estimate of number of "circuits" demanded by multiplying "services" by 2.7, the result of a nationwide survey in 1988.[15] Finally, Bell Atlantic asserts that TSP costs are unit costs that vary with demand, and that its rates would be affected little by a change in demand.[16]

5. ARINC also maintains that the LECs have not provided sufficient cost support information, and claims that discrepancies among their rates are indicative of unreasonable rates.[17] The LECs respond that their cost support is adequate.[18] For its part, Pacific Bell maintains that its costs are higher because it develops its own software rather than relying on software developed by Bell Communications Research, Inc. [19]

B. Changes in Priority During Transition Period

6. ARINC criticizes the LECs for requiring a circuit to be reassigned under the TSP system before any legs can be added or changed on that circuit. ARINC theorizes that this will create an incentive to file TSP applications early, create a backlog, and delay implementation of the TSP system.[20] ARINC also opposes the application of separate non recurring charges for ordering TSP treatment on each leg in a circuit, rather than one nonrecurring charge applied to the circuit itself.[21] Pacific Bell contends that its tariff revisions would allow ARINC to add or change legs to a circuit prior to reassigning that circuit under the TSP system. The other LECs respond that allowing ARINC to add or change priorities on the legs of a circuit prior to assigning that circuit a TSP priority would result in different priorities on the same circuit. These LECs maintain that it would be difficult or impossible to maintain records on TSP priority for each leg of a TSP circuit.[22] Several LECs note that changes in TSP status are billed by circuit, not by leg.[23] Several LECs also observe that the National Communications Service (NCS) imposed the requirement that a circuit be assigned a TSP priority before any legs could be added or changed, not the LECs, as ARINC alleges.[24] Bell Atlantic contends that the Commission considered and rejected a proposal similar to that which ARINC proposes here.[25] Several carriers also assert that the "backlog" feared by ARINC is unlikely.[26]

C. Amortization Period

7. ARINC also suggests a 10-year amortization period for recovery of the costs incurred in creating the TSP system, rather than the 30-month amortization period that most LECs used.[27] Many LECs argue that a 30-month amortization period for TSP costs is appropriate because the majority of TSP users will obtain priority assignments for their circuits during this transition period.[28] Bell Atlantic contends that its TSP costs are relatively small (approximately $124,000), and therefore a 10-year amortization period is not necessary.[29]

D. Discrimination

8. ARINC contends that the different rates charged a "Prime Service Vendor" and a "Subcontractor" may be unreasonable discrimination in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[30] SWB contends that the rate difference between a Prime Service Vendor and a Subcontractor is justified because the TSP priority circuits of Prime Service Vendors are reconciled[31] annually, while the circuits of Subcontractors are reconciled every three years.[32] US West and Bell Atlantic claim

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[7] *Id.*
[8] *Id.* at 13.
[9] Ameritech Reply at 3-4.
[10] CBT Reply at 4; Bell Atlantic Reply at 5.
[11] *Id.*
[12] SNET Reply at 3.
[13] BellSouth Reply at 2; Bell Atlantic Reply at 6; NYNEX Reply at 3.
[14] Pacific Bell Reply at 2-3.
[15] BellSouth Reply at 3.
[16] Bell Atlantic Reply at 7.
[17] ARINC August 13 Petition at 13-15.
[18] SNET Reply at 3; US West Reply at 7-8; Pacific Bell Reply at 4; SWB Reply at 7; BellSouth Reply at 4, Bell Atlantic Reply at 11.
[19] Pacific Bell Reply at 4.
[20] ARINC August 13 Petition at 7-9; ARINC August 27 Petition at 12-13.
[21] *Id.* at 9-10.
[22] US West Reply at 4-5; CBT Reply at 2; SWB Reply at 3; BellSouth Opposition at 6.
[23] CBT Reply at 3; Pacific Bell Reply at 2; Bell Atlantic Reply at 14.
[24] SWB Reply at 3; Bell Atlantic Reply at 3.
[25] Bell Atlantic Reply at 4.
[26] CBT Reply at 3; SWB Reply at 3; NYNEX Reply at 5; US West Reply at 5-6; Pacific Bell Reply at 4; AT&T Reply at 5-7.
[27] ARINC August 13 Petition at 15-16; ARINC August 6 Petition at 5-6.
[28] SNET Reply at 4; Rochester Reply at 3; BellSouth Reply at 5 n. 7; CBT Reply at 4 n. 5; NYNEX Reply at 4-5. ARINC did not protest the TSP tariff of Rochester Telephone Company (Rochester). Rochester filed a reply, however, because it believes that ARINC's petitions were framed in broad terms that could be construed to apply to Rochester's TSP transmittal as well.
[29] Bell Atlantic Reply at 4-5.
[30] ARINC August 13 Petition at 17.
[31] "Reconciliation" refers to the process by which the databases of NCS and the TSP service providers are compared, and discrepancies between those databases are eliminated. The Commission in the *TSP Order* approved an annual reconciliation for prime service vendors and a reconciliation every three years for subcontractors. *TSP Order*, 3 FCC Rcd at 6667.
[32] Southwestern Bell Reply at 8-9.

they also distinguish between Prime Service Vendors and Subcontractors because of the verification requirements, but that the two groups are not charged different rates.[33]

E. Expedited Service Charges

9. ARINC protests the imposition of charges for expediting repair orders in addition to charging for TSP priority classification.[34] ARINC also complains about tariff language which it claims would allow LECs to charge TSP users for repairs that would have been made in the absence of TSP status.[35] The LECs argue that TSP charges recover only the costs of establishing the TSP system, and do not recover the costs of labor or repair. These LECs conclude that it is appropriate to impose an expedited repair charge on TSP users in addition to TSP charges.[36] Bell Atlantic argues that it must impose an expedited repair charge on TSP users to avoid unreasonable discrimination against non-TSP users requesting expedited repair.[37] Finally, Rochester denies that the tariff language cited by ARINC would allow LECs to charge TSP users for repairs that would have been made in the absence of TSP status, as ARINC claims.[38]

F. Priority Change Charge

10. ARINC complains that it should not be held responsible for charges for priority changes ordered by NCS, the body responsible for determining which circuits are eligible for RP and TSP priority treatment.[39] The carriers maintain that, for priority changes mandated by NCS, it is more appropriate to charge TSP users than to recover these costs from the general body of ratepayers.[40] Bell Atlantic and SWB argue that ARINC implicitly agrees to comply with requirements established by NCS when it requests TSP priority treatment, and that paying for priority changes mandated by NCS is one of these requirements.[41] BellSouth says it will not charge ARINC for priority changes it did not request.[42]

G. Volume Discounts

11. ARINC maintains there should be volume discounts for requesting TSP treatment on multiple circuits.[43] Rochester responds that it will assess only one nonrecurring charge per circuit.[44] BellSouth maintains that it treats circuits in multipoint conversions as additional circuits rather than first installations. According to BellSouth, this serves the same purpose as the volume discount advocated by ARINC.[45] Other LECs argue that little savings result from multiple orders, so a volume discount is not justified.[46]

III. DISCUSSION

12. The Common Carrier Bureau has reviewed the LECs' TSP transmittals, ARINC's petitions, and the LEC replies. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

IV. ISSUES CONCERNING AT&T

13. AT&T filed Transmittal 2491 on August 10, 1990, to flow through to its customers in its Tariff F.C.C. No. 11 changes in the LECs' TSP charges. ARINC claims that AT&T's revisions to its Tariff 11 should be rejected because they flow through LEC rates which ARINC contends are unlawful.[47] ARINC also asserts that TSP is a "new service" within the meaning of the *AT&T Price Cap Order*,[48] and that AT&T should be required to submit cost support information in compliance with the provisions of that Order concerning new services.[49]

14. The Common Carrier Bureau has also reviewed AT&T Transmittal 2491, ARINC's petition, and AT&T's reply. We again conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate the TSP tariffs of local exchange carriers and American Telephone and Telegraph Co., filed by Aeronautical Radio, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

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[33] US West Reply at 8-9; Bell Atlantic Reply at 15.
[34] ARINC August 13 Petition at 18; ARINC August 6 Petition at 7-8.
[35] ARINC August 13 Petition at 18.
[36] US West Reply at 9; Rochester Reply at 5-6; Pacific Bell Reply at 5-6; SWB Reply at 9; Ameritech Reply at 5; BellSouth Reply at 6-7.
[37] Bell Atlantic Reply at 12-13.
[38] Rochester Reply at 6-7.
[39] ARINC August 13 Petition at 19.
[40] US West Reply at 9-10; Pacific Bell Reply at 6; SNET Reply at 4; Rochester Reply at 7-8.
[41] Bell Atlantic Reply at 13; SWB Reply at 4.
[42] BellSouth Reply at 7.
[43] ARINC August 13 Petition at 16; ARINC August 27 Petition at 15 n. 32.
[44] Rochester Reply at 3-4.
[45] BellSouth Reply at 7 n. 9.
[46] US West Reply at 6-7; Rochester Reply at 4; Pacific Bell Reply at 5; SWB Reply at 7-8; Ameritech Reply at 4.
[47] ARINC August 27 Petition at 15-16.
[48] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*AT&T Price Cap Order*); Erratum, 4 FCC Rcd 3379 (1989); *modified on recon.* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC Rcd 665 (1991) (*AT&T Price Cap Reconsideration Order*), *appeal docketed*, AT&T v. FCC, No. 91-1178 (D.C. Cir., April 15, 1991).
[49] ARINC August 27 Petition at 10-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 395
BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4	Transmittal No. 354
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal Nos. 2039, 2062, and 2094
US West Communications Revisions to Tariff F.C.C. No. 1	Transmittal No. 127

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1991; Released: July 19, 1991

By the Commission; Commissioner Marshall dissenting and issuing a separate statement.

I. INTRODUCTION

1. On August 6, 1990, the Commission released the *Reconsideration Order* in the individual case basis (ICB) DS3 proceeding which, among other things, directed certain carriers providing "dry," or "dark," fiber services to file tariff revisions that establish generally available, averaged rates for this service not later than 30 days from the release date of that Order, and to revise their tariffs to terminate existing dark fiber ICB rates not later than August 6, 1991.[1] We have defined "dry" or "dark" fiber as unpowered cable, the provision of which does not include the electronics which are necessary to power, or "light," the fiber.[2] In two subsequent Common Carrier Bureau (Bureau) Orders [3] the filing date was extended and the carriers, including the Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), Southwestern Bell Telephone Company (SWB), and US West Communications (US West), were required to file general dark fiber rates by November 1, 1990. The Bureau deferred the filing date to consider petitions for waiver of the dark fiber filing requirement filed by the subject carriers and to allow carriers additional time to formulate rates.[4] On October 26, 1990, the Bureau denied the petitions for waiver of the dark fiber filing requirement,[5] and the affected carriers filed the above-captioned tariff revisions to establish general, averaged dark fiber rates.

2. On February 22, 1991, the Bureau issued an Order[6] initiating an investigation and partially suspending the dark fiber general rates filed by Bell Atlantic, BellSouth, SWB,[7] and US West. By suspending a portion of the carriers' dark fiber rates, the *Suspension Order* allowed a portion of the rates to take effect as interim rates so that customers would be able to order dark fiber service pending the conclusion of this investigation. The Bureau concluded that portions of the carriers' dark fiber tariff filings, including charges and certain terms and conditions, raised substantial questions of lawfulness warranting this investigation.[8] In response to the issues designated in the *Suspension Order*, the local exchange carriers (LECs) subject to this investigation filed direct cases. MCI Telecommunication Corporation (MCI), Metropolitan Fiber Systems, Inc. (MFS), and Williams Telecommunications Group, Inc. (WTG) filed oppositions to the direct cases, to which the LECs replied.

3. For the reasons discussed below, we reject as unlawful the dark fiber rates filed by Bell Atlantic, BellSouth, SWB, and US West. We find that, with certain adjustments, the dark fiber rates that resulted from the Bureau's partial suspension should be prescribed as initial rates for dark fiber service. We also find unlawful and reject the specific tariff terms and conditions which were designated as issues in this investigation. Finally, we require the carriers to provide credit for prepayments made by customers for dark fiber service.

II. RATE LEVELS

4. The primary purpose of this investigation is to determine whether the rates that these carriers filed are excessive. The cost support material that the carriers filed pursuant to the Section 61.38 rules that were in effect at the time of the filing did not provide any assurance that those rates were related to the costs of providing dark fiber service. The direct cases also fail to demonstrate that these rates are cost-based and do not provide an adequate alternative justification for those rates.

5. Some LECs apparently contend that these rates should be accepted because their service will only be offered for a short period. For example, BellSouth says it is reasonable to use the DS3 rate for dark fiber because it plans to offer dark fiber for 30 days and does not expect any demand. US West proposes to terminate the dark fiber offering on August 6, 1991, and has created a combination of charges that would recover the entire investment by August 6.

6. Such termination provisions are not consistent with the *Reconsideration Order* requirement that these carriers file general offerings for dark fiber.[9] That requirement necessarily implies an offering at rates that are based upon the premise that the offering will continue indefinitely. In these circumstances, the carriers have not demonstrated that the rates that those carriers in fact filed are just and reasonable. We find that the rates are unjust and unreasonable.

7. Besides BellSouth, SWB also filed DS3 rates as rates for dark fiber service.[10] Since DS3 rates reflect the costs of equipment that carriers do not provide as part of a dark fiber service, such rates appear excessive on their face. In its direct case, SWB contends that it may properly include central office equipment (COE) costs in its dark fiber rates because some COE is required for regeneration, network efficiencies, alarm surveillance, and monitoring

of the network. While it is plausible that SWB incurs some COE costs in providing dark fiber service, SWB has not presented any reason to assume that it incurs all the COE costs that it would incur in providing DS3 service and has not presented any reason to assume that its DS3 rates do not reflect the full costs of DS3 service. Therefore, we find that the SWB dark fiber rates are not just and reasonable.

8. We have also concluded that Bell Atlantic's rates are unlawful, in this case because Bell Atlantic's per mile dark fiber rate is based not on some interstate allocation of conduit costs, but on Bell Atlantic's charges for leasing conduit space that have been set by off-tariff contracts or, in the case of Bell of Pennsylvania, in an intrastate tariff. Bell Atlantic has not proffered any demonstration that these lease charges are a valid measure of interstate dark fiber conduit costs. The rates for Bell Atlantic's generally tariffed dark fiber offering could, for example, be supported by a showing that the rate is based on the average costs incurred by Bell Atlantic for the conduit investment associated with the service.[11] In the absence of such a showing, Bell Atlantic has failed to justify its rate levels. Because those rates exceed the level required to recover the relevant revenue requirement for dark fiber (*see* Section III, *infra*), we also find Bell Atlantic's rates are unjust and unreasonable.

9. The carriers also suggest that we should find their dark fiber rates just and reasonable because the dark fiber is a new service for purposes of the price cap rules. Although the tariffs were filed before the price cap tariffs became effective on January 1, 1991, the dark fiber rates would have become effective on February 22, 1991, but for the suspension. Carriers argue that their rates would have contributed to net revenue, and any new service rate that contributes to net revenue is just and reasonable under the price cap rules that were in effect at the time.

10. We do not find that argument persuasive for several reasons. The showings required to be filed with various price cap filings, and the classifications of the various types of filings themselves, are designed to guide decisions to suspend rates or to initiate investigations.[12] These filing requirements, while important to the tariff review process, are not the sole criteria on which the lawfulness of a rate in a tariff investigation or a complaint proceeding is resolved. Moreover, we have now adopted a more comprehensive cost showing to accompany new services filings that is designed to indicate whether rates are excessively high.[13]

11. We do not believe net revenue is the test to resolve the question in this investigation. Net revenue does not probe whether rates are too high, but whether rates are predatorily low. In the present case, LECs have opposed general tariffing of dark fiber rates and are actively seeking permission to discontinue service. Rates have been set high based on arguments, for example, that there will be little demand for dark fiber service, or that dark fiber service will be discontinued. Thus, on its face, the net revenue test does not on the facts of this case address the fundamental, statutory requirement that dark fiber rates be just and reasonable. Since dark fiber is a new service, which under our price cap regime we have decided should initially be reviewed based on costs, we resolve pricing issues based on our review of the cost information before us. As previously noted, the record does not justify these rates and we conclude that the recurring charges for dark fiber service filed by these carriers are unjust and unreasonable.

III. PRESCRIBED RATES

12. If we find that rates are unjust and unreasonable, we may either prescribe a rate pursuant to Section 205 of the Communications Act or order the affected carriers to develop rates that will be just and reasonable. We have decided that we should prescribe rates in this proceeding.

13. All of the carriers' rate structures include costs which are not relevant to the provision of dark fiber service, and which the carriers have not demonstrated are necessary to recoup the costs of providing dark fiber service. Since these costs are embedded in the carriers' rate structures, we conclude that the carriers' rate structures are unjust and unreasonable. Specifically, BellSouth and SWB include in their channel termination rate elements COE costs not relevant to the provision of dark fiber service. Bell Atlantic includes in its per mile rate element conduit costs which are based on contract rates and not the actual cost of conduit as it relates to dark fiber. US West's establishment charge is based on the flawed assumptions that all dark fiber services will require new construction and that all dark fiber service will terminate on August 6, 1991.

14. Given the fallibilities of the proffered rate structures, we are selecting a structure that will enable us to prescribe recurring dark fiber rates for these carriers.[14] We conclude that the structure we have selected is just and reasonable. Although alternative rate structures may also be reasonable for a dark fiber offering, we do not have sufficient information at this time to prescribe rates based upon an alternative rate structure.

15. We are establishing a single recurring element that is based on a per mile per strand basis. The rates we are prescribing are initial new service charges for the period ending June 30, 1992. If these offerings continue after June 1992,[15] the prescribed initial rates will become the basis for the incorporation of dark fiber rates into price cap regulation on July 1, 1992.[16] Thereafter, consistent with our desire under price caps not to employ rate of return regulation to oversee rates, we will eliminate the prescribed rates and permit rates to be governed under price cap rules. In addition to our belief that the need for prescriptions is reduced under a price cap system, we also find that our price cap rules are adequate to protect ratepayers. First, dark fiber is a high capacity service that will be folded into the high capacity service category in the special access basket. Price changes for services in the HiCap category are limited to plus or minus 5 percent per year, adjusted for changes in the Price Cap Index. Further, DS1 prices and DS3 prices are also separately banded, or subindexed, at plus or minus 5 percent per year, further limiting LEC pricing flexibility.[17]

16. We have decided to prescribe the interim rates that resulted from the Bureau's partial suspension as initial dark fiber rates for BellSouth, SWB and US West. The partial suspension reflected the computation of a surrogate revenue requirement for dark fiber based on an analysis of fiber optic cable investment and the special access revenue requirement.

17. The revenue requirement provided in COS-1 (P)[18] reflects the revenue required to cover all of the costs for Special Access and to include a 12 percent return on

investment and federal income tax associated with the return. Since the current authorized rate of return is 11.25 percent, the Bureau reduced the net Special Access revenue requirement by 0.75 percent and by the income tax required for 0.75 percent of income resulting in an adjusted revenue requirement. The adjusted revenue requirement was divided by Special Access average net investment to obtain a factor which was applied to net investment in fiber optic cable and its supporting poles and conduit which yielded a revenue requirement associated with fiber optic cable investment.[19]

18. The Bureau determined the revenue producing miles of fiber optic cable[20] by multiplying the total miles of fiber optic cable by the percentage of lit fiber for each carrier.[21] Finally, the revenue requirement per strand per mile for each company was calculated by dividing the revenue requirement for fiber optic cable by the miles of revenue producing fiber. The methods that the Bureau used to compute a partial suspension produce per strand per mile rates of $159 for BellSouth, $112 for SWB, and $266 for US West.

19. Although other methods could be used to compute a just and reasonable rate, we conclude that those rates will be just and reasonable initial new service rates for those carriers and we prescribe those rates for that purpose. We are not persuaded overall by the objections the carriers have presented to the use of those methods for purposes of this rate prescription.

20. In particular, we reject Bell Atlantic's contentions that the Bureau, in averaging all fiber optic cable, fails to consider the specific costs incurred to provide dark fiber service. Bell Atlantic argues that the per strand installed cost of a 12 strand fiber cable is three times more than the per strand cost of larger cable.[22] Bell Atlantic further argues that these economies of scale are not reflected in a rate which is flat rated on a per strand basis.[23] MCI argues that Bell Atlantic's contention has no validity because Bell Atlantic fails to provide any quantitative support for its argument, and further, the Bureau has already evaluated and rejected Bell Atlantic's fiber size contention in the *Suspension Order*.[24]

21. We find unpersuasive Bell Atlantic's argument that specific applications of fiber optic cable should be considered in establishing average rates. The relationship between revenue requirement and investment for various categories of investments included under the Special Access category generally reflects the revenue requirement/investment relationship for the Special Access category as a whole.[25] The ratio for Special Access can be applied to any investment category within Special Access to determine a revenue requirement.

22. SWB contends that a rate should be based upon gross investment rather than net investment because gross investment reflects all investment, whereas net investment excludes depreciated portions of investments.[26] SWB contends that if investment is fully depreciated, the net investment amount would be zero. The actual plant, however, would still be in use and would continue to incur costs, but would be excluded from the ratio.[27] WTG contends that SWB provides no persuasive evidence to support its views. WTG maintains that the Bureau's use of net investment in calculating a dark fiber revenue requirement is fully consistent with the Commission's Part 69 requirements and with SWB's reliance on net investment in its recent price cap filing.[28] WTG Opposition at 20.

23. The use of gross investment would distort the final result by overstating the rate base. The estimated revenue requirement displayed in the carriers' TRPs is based on net investment, *i.e.*, carriers earn an authorized rate based on average net investment and estimated federal income tax (FIT) liabilities are based on these earnings. Further, using gross investment would distort the revenue requirement/investment ratio by re-introducing depreciated plant investment which has already been charged as an operating expense in another period.

24. The carriers also contend that prescription of these rates would cause them to fail the net revenue test under price cap regulation and the rates are therefore unlawful. The carriers generally argue that existing DS3 customers will migrate to dark fiber service and this migration will result in losses in overall revenue. The net revenue test for price cap filings was designed to provide assurance that a carrier-initiated rate is not predatory and, therefore, unreasonably low. That test is not germane to this prescription. Moreover, the carriers have not demonstrated that these rates will cause them to fail a net revenue test. The carriers' claims that they would experience a reduction in net revenue are based on conjecture regarding cross elasticities.

25. For Bell Atlantic we prescribe a rate of $187 per mile per fiber. This adjustment to the rate produced by the partial suspension reflects the lit fiber/total fiber ratio of 33.1 percent, which Bell Atlantic presented in its direct case.[29] The Bureau's rate computation for Bell Atlantic was based on the reported industry average of 46.8 percent because Bell Atlantic failed to provide its lit/total fiber data in its 1989 Form M report, nor did Bell Atlantic provide such data when the Bureau requested it for the Commission's annual fiber deployment report.[30] However, we accept the lit fiber/total fiber ratio Bell Atlantic presented in its direct case because that ratio is supported by data in Bell Atlantic's 1990 Form M report.

IV. TERMS AND CONDITIONS

The *Suspension Order* also designated several of the terms and conditions in the dark fiber tariffs for investigation.

A. Automatic Termination Provisions

26. As previously noted, the termination provisions in some of the tariffs confict with our directive in the *Reconsideration Order* to file a general tariff for dark fiber service. That Order did not contemplate allowing the carriers to discontinue service without this Commission's approval. The determination of whether the carriers should be allowed to discontinue dark fiber service, or whether they must seek our approval of any such discontinuance, is properly addressed in the pending Section 214 proceeding. The carriers procedural arguments and their assertions regarding their intentions to exit the dark fiber business will therefore be addressed at a later date. Accordingly, we conclude that the automatic termination provisions are unjust and unreasonable.

27. In addition, we conclude that SWB's language regarding the limited duration and customer risk in taking dark fiber service is speculative and inconsistent with the spirit, if not the letter, of the *Reconsideration Order*. It appears that the sole purpose of this language is to discourage customers from taking dark fiber service under interim or any other rates.[31] In the interest of enforcing

our requirement that dark fiber be generally available and free of unreasonable fetters, we reject as unjust and unreasonable SWB's tariff language regarding customer risk and the limited duration of SWB's dark fiber offering.

B. Bit Rate Restriction

28. SWB claims that central office equipment is necessary to its ability to offer specialized "bit rate encumbered" dark fiber service. SWB claims this equipment is necessary for network efficiencies, alarm surveillance, and monitoring of the network.[32] SWB asserts that its bit rate restriction is reasonable and consistent with the *Reconsideration Order*.[33] SWB contends that the bit rate restriction on dark fiber protects SWB's ability to increase the capacity of its fiber network.[34] SWB maintains that electronic upgrades, which increase the capacity of its fiber network, allow SWB to keep its capital costs for fiber deployment low.[35] SWB claims that if it is required to offer dark fiber without such restrictions it will not be able to increase its network capacity through upgrading electronics. According to SWB, this would result in inefficiencies and SWB would be forced to augment its network with less economical alternatives.[36]

29. MCI argues that SWB attempts to distinguish between "pure" and "encumbered" dark fiber services only to advance SWB's argument that it should not be required to provide dark fiber.[37] SWB's assertion that a bit rate restriction is necessary, asserts MCI, demonstrates that SWB is attempting to exercise its market power and force customers to accept only what SWB wishes to offer.[38] MFS contends that SWB's attempt to distinguish between categories of dark fiber is designed to confuse the issue of whether, as MFS argues, dark fiber is a DS3-equivalent service.[39] WTG concedes that SWB's dark fiber ICB arrangements typically identify a bit rate transmission speed, but claims that SWB has on several occasions permitted WTG to change its transmission speeds over dark fiber facilities without increasing its rates.[40]

30. In reply, SWB says that the bit rate of dark fiber service is encumbered both by tariff and by contract.[41] SWB asserts that customers were required to receive permission from SWB before they could increase their transmission speed over dark fiber facilities, and that upon such requests new ICB contracts were negotiated and executed.[42] According to SWB, this entailed the customer's paying a nonrecurring charge and SWB filing tariff revisions to reflect the new arrangement.[43] It is irrelevant, claims SWB, that SWB did not physically encumber the bit rate in provisioning the service.

31. We conclude that SWB's argument that it never offered "pure" dark fiber service is essentially an untimely petition for reconsideration of our *Reconsideration Order*. In any event, we find unconvincing SWB's claim that it never offered "pure" dark fiber service since it is apparent from the record that dark fiber customers have changed transmission speeds over existing dark fiber facilities with apparently minimal or no change in the terms, conditions, and rates under which the customers originally received dark fiber service. More fundamentally, while SWB did identify bit rates on its dark fiber ICB arrangements, we find that such a restriction is unjust and unreasonable when, as here, it is the dark fiber customer who owns the electronics that power the dark fiber and determine the bit rate carried over the fiber. Accordingly, we reject as unjust and unreasonable SWB's contention that it can restrict the bit rate of its dark fiber service offering.

C. Five-Year Minimum Service Commitment

32. Bell Atlantic argues that the five-year minimum service commitment it requires for dark fiber service is not only reasonable, but necessary for Bell Atlantic to recover the investment required to provide dark fiber facilities.[44] Bell Atlantic must have a five-year minimum service period in order to recover the cost of dark fiber facilities which, contends Bell Atlantic, are virtually nonreusable because they are dedicated point-to-point configurations designed for the specific needs of a single customer.[45] Bell Atlantic claims that if it were required to offer dark fiber on a short-term basis at long-term prices dark fiber customers could abandon service before the costs of facilities are recovered. Bell Atlantic maintains that its other customers would end up paying for this "stranded" investment.[46] Moreover, says Bell Atlantic, the five-year service period is consistent with the demands of existing dark fiber customers and other Special Access minimum service periods, which range from one to five years.[47]

33. WTG asserts that Bell Atlantic has proffered no evidence to support its five-year minimum service commitment for dark fiber service.[48] Bell Atlantic replies that it has demonstrated that there is little reuse for dark fiber and that the five-year term is consistent with existing ICB arrangements and with its Special Access rate structure.[49]

34. We conclude that Bell Atlantic's five-year minimum service period for dark fiber service is unreasonable and conflicts with our *Reconsideration Order*. Bell Atlantic provides no convincing support for its claim that stranded plant would exist and dark fiber facilities would be nonreusable in the event a dark fiber customer takes service for less than five years. Moreover, Bell Atlantic's assertion presupposes that the only way it can recover all dark fiber related costs is pursuant to recurring and nonrecurring dark fiber rates. However, we are not persuaded that is necessarily the case. For instance, to the extent that a carrier must specially construct dark fiber facilities for a customer, we presume that the costs of the facility can and will be recovered under the carrier's special construction tariff, which would allow carriers to recover in a one-time charge reasonable costs of non-reusable investment. For the foregoing reasons, we conclude that Bell Atlantic's five-year minimum service condition for dark fiber service is unreasonable. We conclude, however, that consistent with other carriers' tariffs, as well as other Bell Atlantic Special Access minimum service commitments, month-to-month service with a minimum service period of one year would not be unreasonable for the purposes of dark fiber.

V. CREDIT ALLOWANCES FOR "UP-FRONT" PAYMENTS

35. The *Suspension Order* asked whether these carriers should "be required to provide credit for payments already made by dark fiber ICB customers."[50] BellSouth states that it is willing to provide credits for ICB customers converting to general dark fiber rates. Bell Atlantic maintains that it has already included in its tariff a credit mechanism for customers who made up-front payments in order to "buy down" their monthly rates.[51] SWB

says that it has only one dark fiber arrangement that included an up-front payment that will expire August 5, 1991. SWB asserts that the customer taking dark fiber service under that ICB will receive credit based on the customer's remaining term. According to SWB, the amount to be refunded that customer was filed in Transmittal 2025.[52] US West argues that it did not include a credit mechanism in its tariff because ICBs and the general tariff will terminate simultaneously, *i.e.*, August 6, 1991. Since the terms of ICB agreements and the general tariff differ, asserts US West, it would be incorrect to apply a common credit and refund mechanism to these disparate contracts.[53] US West claims that the resolution of any up-front payments is a contract issue and unrelated to US West's general dark fiber tariff.[54]

36. WTG asserts that carriers should be required to provide credit for up-front payments made by dark fiber customers.[55] In particular, WTG contends that the carriers subject to this investigation should be subject to the same credit provision requirements established in the *ICB Order* and more fully explained in the *DS3 Compliance Order*.[56] In reply, US West contends that circumstances surrounding its DS3 ICBs are different than the circumstances surrounding its dark fiber ICBs. US West Reply at 10. US West claims that it will have only two dark fiber customers who would be eligible for any credit, and that fashioning a credit mechanism for only two customers with a small number of ICBs would be illogical.[57]

37. We reject US West's contention that a credit mechanism for up-front payments made by dark fiber customers is unnecessary. We conclude that the basic concern underlying our requirement that the carriers subject to the *ICB Order* tariff a credit mechanism -- to ensure that customers receive compensation for amounts they have already paid for service which they will not receive -- is directly applicable to dark fiber ICBs that will terminate as a result of the *Reconsideration Order*. Therefore, we conclude that the carriers subject to this investigation which have not tariffed a credit mechanism have adopted an unjust and unreasonable practice and must tariff a credit mechanism pursuant to the directives set out by the Bureau and this Commission in the *ICB Order* and the *DS3 Compliance Order*. In light of the fact that the subject carriers, with the exception of US West, have either tariffed a credit mechanism for up-front payments or expressed an intent to compensate customers who made prepayments for dark fiber service, and that these carriers have tariffed such mechanisms for their DS3 ICBs, this requirement should not prove unduly burdensome for the carriers.

VI. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 204(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 403, that the dark fiber rates contained in Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 395, BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 354, Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 2039, 2062, and 2094, and US West Communications, Tariff F.C.C. No. 1, Transmittal No. 127, are unlawful and therefore ARE REJECTED.

39. IT IS FURTHER ORDERED that the terms and conditions discussed in this Order in Section IV, *supra*, and contained in Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 395, BellSouth Telephone Companies, Tariff F.C.C. No. 4, Transmittal No. 354, Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 2039, 2062, and 2094, and US West Communications, Tariff F.C.C. No. 1, Transmittal No. 127, are inconsistent with this Commission's *Reconsideration Order*, are unlawful, and therefore ARE REJECTED.

40. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 205, 403, that the rate methodology and dark fiber rates, as they are described on a per carrier basis in Section III of this Order, are just, reasonable, and ARE PRESCRIBED for the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications.

41. IT IS FURTHER ORDERED that the prescribed rates will remain in effect until July 1, 1992, at which time the carriers SHALL INCORPORATE the rates into their respective Special Access basket and the rates may be altered within the constraints of the price cap rules.

42. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 204(a), 205, 403, that the BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications, SHALL FILE tariff revisions to establish credit mechanisms for customers who made prepayments for dark fiber service, as discussed in Section V of this Order, not later than five business days from the release of this Order, to become effective on not less than one day's notice.

43. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications SHALL FILE tariff revisions removing rejected material from their respective tariffs and incorporating each carrier's prescribed dark fiber rate, as specified in Section III above, not later than five business days from the release of this Order. These revisions shall be scheduled to become effective on not less than one day's notice.

44. IT IS FURTHER ORDERED that Special Permission No. 91-604 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of compliance with this Order.

45. IT IS FURTHER ORDERED that the investigation in CC Docket No. 88-136 of the general dark fiber tariff rates of the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications, IS TERMINATED.

46. IT IS FURTHER ORDERED that this Order IS EFFECTIVE on release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842 (1990) (*Reconsideration Order*), *further recon. pending.*

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634 n.7 (1989) (*ICB Order*).

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 5420 (Com.Car.Bur. 1990); Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 5919 (Com.Car.Bur. 1990).

[4] We note that all of the carriers subject to the dark fiber rate investigation have filed applications seeking authority to cease providing dark fiber service under generally available tariffs. *See, e.g.*, Southwestern Bell Telephone Company, Application for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Specialized Dark Fiber Arrangements, Nov. 2, 1990 (filed "under protest"). These applications have been contested by various parties and are currently being considered by the Commission.

[5] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 6772 (Com.Car.Bur. 1990) (*Waiver Order*).

[6] Bell Atlantic Telephone Companies, *et al.*, CC Docket No. 88-136, Memorandum Opinion and Order, 6 FCC Rcd 1436 (Com.Car.Bur. 1991) (*Suspension Order*).

[7] Prior to the release of the *Suspension Order*, and after it filed its general dark fiber rates, SWB filed tariff revisions to restructure rates for its MegaLink Custom Services, which include dark fiber. Those portions of the restructure which pertain to SWB's dark fiber service were suspended and incorporated into this investigation. *See* Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, Transmittal Nos. 2062 and 2094, DA 91-645, released May 24, 1991 (Com.Car.Bur.).

[8] The carriers filed applications for review of the *Suspension Order* between February 27, 1991 and March 25, 1991.

[9] *See* para. 26, *infra*.

[10] SWB subsequently restructured its MegaLink Custom Optical rates, which include dark fiber service. *See* note 7, *supra*. The revised rates SWB filed would still impose the same charges for DS3 and dark fiber service.

[11] In addition, to derive its dark fiber channel termination rate, Bell Atlantic uses average DS3 business line loop lengths to develop its average loop costs for dark fiber. However, nothing in the record suggests that the loop lengths for dark fiber service are the same as, or share any characteristics with, DS3 loops.

[12] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Report and Order, 4 FCC Rcd 2873, 3295-3307 (*AT & T Price Cap Order*) (1989).

[13] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rule Making, FCC 91-186, rel. July 11, 1991 (*Part 69/ONA Order*).

[14] The nonrecurring charges other than the US West Establishment Charge were not designated for investigation and are not affected by this Order.

[15] The charges might, of course, terminate before June 1992 if we decide to grant the pending Section 214 applications to discontinue the service.

[16] This will be the first annual filing following the introduction of the general service for which base year demand (1991) will be available.

[17] *See* 47 C.F.R. § 61.47(h).

[18] Carriers provide in their annual access filings a tariff review plan (TRP) which displays basic cost and demand information in a manner that is consistent for all LECs. This information aids the Commission and interested parties in reviewing the tariffs for compliance with relevant rules and regulations. One of the tables in the TRP is the COS-1 (P) which displays on a prospective basis, by access element, all costs and revenues anticipated by the carriers.

[19] The average net investment in fiber optic cable is from the 1989 Form M Schedule B-5C. Average net investment attributable to poles and conduit used in support of fiber optic cable was provided by the BOCs. Conduit data for Bell Atlantic was unavailable; therefore, an allocation factor based on the average ratio of fiber to conduit displayed by the other three carriers that provided data was used.

[20] Data is from 1989 Form M Schedule S-1.

[21] *See* Questionaire from Chief, Industry Analysis Division, Common Carrier Bureau, dated Sept. 10, 1990.

[22] Bell Atlantic claims that most of its fiber optic cable is deployed over 72 to 144 strand facilities, whereas dark fiber facilities are typically deployed over 12 strand facilities.

[23] Bell Atlantic Direct Case at 4-6.

[24] MCI Opposition at 7.

[25] As a basis, the Net Special Access Revenue Requirement and the Average Special Access Net Investment for each of the BOCs was obtained from the 1989 Tariff Review Plan (TRP) Prospective Cost of Service Study (COS-1(P)).

[26] Net investment includes total plant and other investments less depreciation, amortization, deferred Federal Income Tax (FIT), customer deposits, and FCC reserve adjustments.

[27] In support of its argument, SWB claims that the level of depreciation reserve for Special Access is 31.39 percent for gross investment and only 13.08 percent for fiber. SWB Direct Case at 26.

[28] WTG Opposition at 20.

[29] *See* Bell Atlantic Direct Case, Attachment 2.

[30] *See* Questionaire from Chief, Industry Analysis Division, Common Carrier Bureau, dated Sept. 10, 1990.

[31] In this regard we also note US West's admonitions to prospective dark fiber customers regarding its intention to retroactively assess rates higher than those interim rates allowed pursuant to the *Suspension Order*. *See* Letter from L. Sarjeant, Chief Counsel-Federal Regulatory, US West, to Secretary, Federal Communications Comm'n, May 13, 1991, Attachment I, at 2-3 ("US West Communications Notice Regarding Interim Rates for Dark Fiber," dated Apr. 22, 1991).

Although the issue of the carriers' responsibilities in offering dark fiber service will be resolved by this Commission in the Section 214 proceeding, we view with concern apparent efforts

by the carriers to discourage customer demand and thus circumvent their present duty to make dark fiber generally available.

[32] SWB Direct Case at 17-18.

[33] *Id.* at 21.

[34] *Id.*

[35] *Id.* at 22.

[36] *Id.*

[37] MCI Opposition at 13.

[38] *Id.*

[39] MFS Opposition at 7.

[40] WTG Opposition at 6.

[41] SWB Reply at 17.

[42] *Id.* at 18.

[43] *Id.*

[44] Bell Atlantic Direct Case at 16.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 17-18.

[48] WTG Opposition at 15.

[49] Bell Atlantic Reply at 12.

[50] 6 FCC Rcd at 1440.

[51] BellSouth Direct Case at 16; Bell Atlantic Direct Case at 19.

[52] SWB Direct Case at 33.

[53] US West Direct Case at 15.

[54] *Id.*

[55] WTG Opposition at 16.

[56] WTG Opposition at 16 (*citing* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634, 8644 (1989); DS3 ICB Order Compliance Filings, CC Docket No. 88-136, 5 FCC Rcd 3331 (Com.Car.Bur. 1990)(*DS3 Compliance Order*)).

[57] *Id.*

APPENDIX

FCC ESTIMATE OF THE REVENUE REQUIREMENT FOR SINGLE STRAND FIBER OPTIC CABLE

		BELL ATLANTIC	BELLSOUTH	SOUTHWESTERN	US WEST
1	NET SPECIAL ACCESS REVENUE REQUIREMENT [89 TRP COS–1 P (LN 100(R)]	$438,740,000	$421,842,000	$295,754,000	$265,732,000
2	NET RETURN @12 PERCENT [89 TRP COS–1 (P) LN 630(R)]	$92,845,000	$79,423,000	$63,415,000	$53,327,000
3	REVENUE REQUIREMENT ADJUSTMENT TO 11.25 ROR (0.0075 / 0.12 = .0625) (0.0625 * LN 2)	$5,802,813	$4,963,938	$3,963,438	$3,332,938
4	FEDERAL INCOME TAX ADJUSTMENT (0.5152 * LN 3)	$2,989,609	$2,557,421	$2,041,963	$1,717,129
5	ADJUSTED REVENUE REQUIREMENT (LN 1 LESS LN 3 & LN 4)	$429,947,579	$414,120,642	$289,748,600	$260,681,933
6	AVERAGE SPECIAL ACCESS NET INVESTMENT [89 TRP COS–1 (P) LN 620(R)]	$773,708,000	$661,857,000	$528,449,000	$444,390,000
7	REV REQ/INVESTMENT ADJUSTMENT FACTOR (LN 5 / LN 6)	0.555697	0.625695	0.548300	0.586606
8	AVG NET INVESTMENT IN FIBER OPTIC CABLE (89 FORM M SCHEDULE B–5C)	$388,772,352	$560,671,280	$214,205,746	$286,697,266
9	AVG NET INV IN POLES ATTRIB TO FIBER OPTIC CABLE (DATA REQUEST)	$0	$9,737,488	$0	$152,000
10	AVG NET INV IN CONDUIT ATTRIBUTABLE TO FIBER OPTIC CABLE (DATA REQUEST) *	$110,420,308	$122,696,772	$89,678,794	$89,136,000
11	TOTAL AVG NET FIBER INVESTMENT (LN 8 + LN 9 + LN 10)	$499,192,660	$693,105,540	$303,884,540	$375,985,266
12	REVENUE REQUIREMENT FOR FIBER (LN 7 * LN 11)	$277,400,099	$433,672,698	$166,619,901	$220,555,291
13	FIBER OPTIC CABLE (MILES) (89 FORM M SCHEDULE S–1)	373,398	445,452	270,300	234,851
14	PERCENTAGE LIT FIBER (INDUSTRY ANALYSIS DIVISION DATA)	33.10	50.90	45.90	29.40
15	MILES OF REVENUE PRODUCING FIBER OPTIC CABLE (LN 13 * LN 14)	123,595	226,735	124,089	69,046
16	REVENUE REQUIREMENT PER REVENUE PRODUCING MILE OF FIBER OPTIC CABLE (LN 12 / LN 15)	$2,244	$1,913	$1,343	$3,194
17	REVENUE REQUIREMENT PER MONTH PER MILE PER STRAND (LN 16 / 12)	$187	$159	$112	$266

NOTE:

* ALTHOUGH TOTAL CONDUIT DATA IS AVAILABLE, BELL ATLANTIC DID NOT PROVIDE INFORMATION REGARDING THE AMOUNT OF CONDUIT ASSOCIATED WITH FIBER OPTIC CABLE. THEREFORE A FACTOR OF 0.28402 BASED ON THE OTHER 3 COMPANIES WAS APPLIED.
(LN 10 BS + SWB + US WEST / LN 8 BS + SWB + US WEST = FACTOR)

STATEMENT OF COMMISSIONER SHERRIE P. MARSHALL

Re: Local Exchange Carriers' Individual Case Basis DS3 Service Offerings; Bell Atlantic Telephone Companies, *et al.*, Investigation of Local Exchange Carriers' Dark Fiber Rates

These items fail to resolve the threshold jurisdictional question raised by petitioners: is dark fiber a communications service subject to regulation under Title II of the Communications Act?[1] Accordingly, I dissent.

FOOTNOTE TO THE STATEMENT

[1] 47 U.S.C. §§201-224.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 84-1234

In the Matter

Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Mobile Satellite Service for the Provision of Various Common Carrier Services

In the Matter of the Applications of

GLOBAL LAND MOBILE SATELLITE, INC.	File Nos. 1625/1626-DSS-P/L-85
GLOBESAT EXPRESS	File Nos. 1627-DSSP/L-(50)-85 1628-DSS-P(5)-85
HUGHES COMMUNICATIONS MOBILE SATELLITE, INC.	File No. 1629-DSSP/L-85
MCCA AMERICAN SATELLITE SERVICE CORPORATION	File Nos. 1630-DSSP/L-85 1631-DSS-P 85
McCAW SPACE TECHNOLOGIES, INC.	File No. 1632-DSSP/L-85
MOBILE SATELLITE CORPORATION	File Nos. 1633/1634/1635-DSS-P/L-85
MOBILE SATELLITE SERVICE, INC.	File Nos. 1636/1637-DSS-P/L-85 1638-DSS-P-85
NORTH AMERICAN MOBILE SATELLITE, INC.	File Nos. 1639-DSSP/L-85 1640-DSS-P-85
SATELLITE MOBILE TELEPHONE CO.	File Nos. 1646/1647-DSS-P/L-85
SKYLINK CORPORATION	File Nos. 1648/1649-DSS-P/L-85
TRANSIT COMMUNICATIONS, INC.	File Nos. 1650/1651-DSS-P/L-85 1652-DSS-P-85

TENTATIVE DECISION

Adopted: July 30, 1991; Released: August 2, 1991

By the Commission:

1. By this tentative decision, the Commission reconsiders portions of several orders related to the licensing of a domestic mobile satellite service (MSS) provider in the upper L-band frequencies.[1] This action is prompted by the decision of the Court of Appeals for the District of Columbia, which remanded to us for further consideration two aspects of these decisions.[2] After fully reviewing those portions of the proceeding in accordance with the court's decision, we conclude that the Commission possesses statutory authority to impose a licensing structure that requires a consortium comprised of the applicants. We further tentatively conclude that a consortium requirement is a reasonable exercise of our rulemaking authority and that compelling factors unique to this proceeding require that a mandatory consortium approach, rather than comparative hearings, be adopted. In particular, selection of a licensee through a comparative hearing would prevent the United States from continuing with its ongoing international frequency coordination of a domestic MSS system in the upper L-band, coordination that can only continue with the assistance of a domestic licensee. If the United States fails to participate in the coordination process, there is a strong likelihood that any chance to coordinate sufficient spectrum to support a domestic system in that band will be lost. We also tentatively conclude that the financial requirements previously imposed for participation in the consortium should be modified and that the three entities whose applications were reinstated by the court should be provided an opportunity to join the consortium at this time. Finally, to allow international coordination of a domestic MSS system to continue, we shall grant American Mobile Satellite Corporation (AMSC) a temporary authorization pending the issuance of a *Final Decision*. [3]

[1] The specific frequencies involved in this proceeding are the 1545-1559 MHz and 1646.5-1660.5 MHz bands. *See* Report and Order, Gen. Docket 84-1234, 2 FCC Rcd 1285 (1986).

[2] *See* Aeronautical Radio, Inc. v. FCC, No. 88-1009, slip op. (March 19, 1991).

[3] In this decision, we also deny the Motion to Dismiss and Disqualify filed by Mobile Satellite Service, Inc. (MSSI). The motion is based on an alleged violation of the Commission's *ex parte* rules by one of the applicants, AMSC. As set forth in a letter from the FCC Managing Director to counsel for MSSI, even assuming that AMSC engaged in the conduct alleged by MSSI, there is no violation of the Commission's *ex parte* rules.

I. BACKGROUND

2. This proceeding was begun in 1985 when the Commission issued a *Notice of Proposed Rulemaking* to allocate spectrum for MSS and to establish licensing procedures and regulatory and technical policies for this new service.[4] The Commission proposed that 8 MHz in the UHF band and some portion of the upper L-band be allocated for MSS.[5] In the *Notice*, the Commission invited interested parties to file applications to implement MSS systems and established a cutoff date of March 29, 1985 for filing applications.

3. In addition to the comments filed on all aspects of the Commission's proposals, twelve applications were filed for authority to construct launch, and operate MSS systems. [6] Eleven of the applicants proposed geostationary satellite systems; one proposed a low-Earth orbit system. Ten applications contained proposals to operate in both the upper L-band and the UHF band, one contained a proposal for the UHF band only, and one contained a proposal for the upper L-band only.

4. In July 1986, the Commission reallocated 27 MHz of spectrum in the L-band for MSS for both uplink and downlink transmissions, to be shared with AMSS(R).[7] The following year, the Commission adopted the *Second Report and Order* in which it decided, among other things, that sufficient spectrum was available to license only one MSS system in the upper L-band spectrum for the first generation, that the MSS license would be granted to a consortium comprised of all qualified applicants, and that each applicant would demonstrate its financial qualifications by making a $5 million cash contribution into the consortium.[8] Subsequently, the Common Carrier Bureau, in response to requests by two applicants, determined that unconditional letters of credit or performance bonds could be submitted as alternatives to a cash contribution.[9] After several applicants later filed pleadings questioning the financial showings submitted by other applicants, the Bureau reinstated the cash requirement.[10]

5. Pursuant to this directive, eight applicants subsequently deposited $5 million, in cash, into a central escrow account. The remaining three applicants -- Global, Globesat, and MSSI -- did not contribute to this account and their applications were dismissed by the Bureau for failure to meet the Commission's minimum qualifying criteria established for all applicants.[11] The group of eight participating applicants formed the American Mobile Satellite Consortium (AMSC) and submitted a joint technical proposal and operating agreement to the FCC in 1988.[12]

6. The three dismissed applicants sought reconsideration and review of the series of orders leading up to the dismissals. In 1989, the Commission affirmed the dismissals.[13] The Commission concurrently issued a license to AMSC to construct, launch, and operate an MSS system in the upper L-band.[14] The entities whose applications had been dismissed filed an appeal with the United States Court of Appeals.

7. In March1991, the Court of Appeals for the District of Columbia Circuit (*ARINC* court) remanded for further consideration two aspects of the Commission's licensing decisions.[15] First, the court found arbitrary and capricious the manner in which the Commission imposed the requirement that applicants demonstrate their financial qualifications through a cash contribution.[16] Second, the court vacated the Commission's consortium rules, holding that the Commission had not provided an adequate justification for its decision to forgo comparative hearings on the competing applications.[17] The court also reversed the dismissal of the Global, Globesat, and MSSI applications. [18] On June 7, 1991, the court issued its mandate.

II. DISCUSSION

8. We have reviewed the *ARINC* court's decision and the comments that were submitted in response to the Commission's Public Notice. We have also considered certain additional factors related to the international frequency coordination process that are relevant to this proceeding. After considering the options available to us to implement the court's decision, we conclude that the public interest in securing sufficient spectrum for a United States mobile satellite system requires that the mobile satellite service licensing issues be resolved as quickly as possible. We further conclude that proceeding with a

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[4] 50 Fed. Reg. 8149 (February 28, 1985). A request for the allocation was made in 1982 by the National Aeronautical and Space Administration (NASA).

[5] The upper L-band was at that time allocated domestically and internationally for the aeronautical mobile satellite service reserved for communications relating to the safety and regularity of flight (AMSS(R)).

[6] These were filed by Global Land Mobile Satellite, Inc. (Global), Globesat Express (Globesat), Hughes Communications Mobile Satellite, Inc. (Hughes), MCCA American Satellite Service Corporation (MCCA), McCaw Space Technologies, Inc. (McCaw), Mobile Satellite Corporation (Mobilesat), Mobile Satellite Service, Inc. (MSSI), North American Mobile Satellite, Inc. (NAMS), Omninet Corporation (Omninet), Satellite Mobile Telephone Co. (SMTC), Skylink Corporation (Skylink), and Wismer & Becker/Transit Communications, Inc. (Transit). Omninet subsequently withdrew its application. *See* letter from Counsel, Omninet Corporation to Secretary, FCC (June 15, 1987).

[7] *See* Report and Order, 2 FCC Rcd at 1285.

[8] 2 FCC Rcd 485 (1987).

[9] Declaratory Order, 2 FCC Rcd 2417 (Common Carrier Bureau, 1987).

[10] Order, 2 FCC Rcd 5647 (Common Carrier Bureau, 1987).

[11] *See* Global Land Mobile Satellite, Inc., *et al.*, 2 FCC Rcd 5552 (Common Carrier Bureau, 1987).

[12] American Mobile Satellite Consortium later changed its name to American Mobile Satellite Corporation.

[13] Memorandum Opinion and Order, 4 FCC Rcd 6016 (1989).

[14] Memorandum Opinion, Order and Authorization, 4 FCC Rcd 6041 (1989).

[15] Aeronautical Radio, Inc. (ARINC) also filed an appeal of the Commission's allocation decision and its decision to dismiss ARINC's nonconforming application, which had been filed after the cutoff date. The court upheld both the allocation decision and the ARINC dismissal. It later denied, *en banc*, ARINC's petition for rehearing.

[16] Slip op., *supra* note 2, at 38-41.

[17] *Id.* at 45-52.

[18] After the court's decision was issued, the Commission issued a public notice inviting those parties directly affected by the decision to submit their views as to how the Commission should proceed. *See* Public Notice, Report No. DS-1077, DA 91-500 (April 6, 1991). Four parties to the proceeding -- AMSC, Global, Globesat, and MSSI -- filed comments. Three others -- ARINC, Satellite CD Radio, Inc. and Rockwell -- also filed comments.

mandatory consortium complies with the Communications Act and serves the public interest. The consortium approach will enable the United States to meet the urgent need for a prompt MSS authorization -- a need that, in this instance, outweighs the possible countervailing public interest benefit of a comparative proceeding. Moreover, even though comparative hearings are not conducted, the consortium approach will still ensure that the United States receives state-of-the-art MSS service from a financially qualified licensee. We also provide Global, Globesat Express and MSSI with an opportunity to join the consortium at this time with no minimum financial contribution required, although ownership shares must be proportional to each entity's contribution.

A. Consortium Requirement

1. The ARINC Court's Decision

9. As indicated above, the *ARINC* court invalidated the Commission's consortium rule for MSS applicants and directed the Commission to reconsider its requirement that ownership of the licensee be vested only in a consortium of the qualified applicants. The court's decision was in response to arguments by the appellants that the consortium rule violates the comparative hearing requirement of *Ashbacker Radio Corp. v. FCC*. [19] The court did not decide whether, under *Ashbacker*, the Commission would ever be justified in imposing a consortium requirement in a licensing proceeding. It did determine, however, that the Commission had not provided an adequate justification for its abandonment of the comparative hearing approach, noting that the comparative hearing process is "unquestionably the standard method for the Commission to resolve mutually exclusive applications." [20] Specifically, the court stated, any departure from the practice of resolving mutually exclusive applications through comparative hearings "must be premised on some truly compelling grounds that are special to the particular proceeding in which the Commission proposes to adopt a consortium procedure. . . ." [21] Absent such a standard, the court believed the Commission could impose a consortium requirement "in every license proceeding involving multiple applicants, rendering the comparative hearing requirement a nullity." [22]

10. The court further held that the factors relied upon by the Commission in the MSS proceeding did not constitute special circumstances sufficient to abandon the comparative hearing procedure. In the court's view, the factors cited by the Commission either applied with equal force to all other licensing proceedings or could be achieved within the context of comparative hearings.[23] On remand, the Commission was thus directed, first, to consider whether it possesses the requisite statutory authority to impose a consortium in lieu of comparative hearings, and, second, assuming some legitimate basis for its authority, to "demonstrate that a departure from the comparative hearing process is justified by truly compelling factors that are special to the [MSS] licensing proceeding."[24]

11. In accordance with the court's remand order, we address below the basis for our conclusion that imposing a consortium requirement in appropriate circumstances, instead of conducting comparative hearings, is within the Commission's legal authority. Further, we demonstrate that there is both a reasonable and a compelling justification for imposing such a requirement in this proceeding.[25]

2. Legal Authority

a. The Statutory Hearing Requirement of Section 309(e)

12. In determining whether the Commission has statutory authority to depart from the comparative hearing process, we begin with the statutory language itself. The Communications Act, of course, makes no express reference to "comparative" hearings as a means of selecting licensees. The Act provides only that the Commission may not deny an application without affording an opportunity for hearing. 47 U.S.C. § 309(e). It is well-settled that the concept of a comparative hearing as a statutory entitlement stems from the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*,[26] interpreting that section 309 hearing right. The Court there determined, as a procedural matter, that where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the right to a hearing set forth in section 309.[27]

13. It is equally well-established that there are exceptions to the entitlement to an *Ashbacker* comparative hearing. In *U.S. v. Storer Broadcasting Co.*,[28] the Supreme Court clarified that the opportunity for hearing afforded in section 309, which was earlier addressed in *Ashbacker*, does not withdraw from the Commission its rulemaking authority. The *Storer* decision thus establishes that the Commission need not hold a full adjudicatory hearing prior to denial of an application that is inconsistent with rules enacted under the broad public decision, the *Ashbacker* Court also implied that the Commission could, without a hearing, grant one of two competing applications for a permanent license "if it found that the public interest demanded such urgency."[29] Finally, the statutory lottery procedure, discussed *infra*, is another exception to the section 309(e) hearing requirement.

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19 326 U.S. 327 (1945).

20 Slip op., *supra* note 2, at 45.

21 *Id.* at 49.

22 *Id.* at 49-50.

23 *Id.* at 50-51.

24 *Id.* at 51.

25 We have decided against the two track approach outlined by AMSC in its comments filed in response to the public notice. Under AMSC's proposal, in the Track I proceeding, applicants not currently members of AMSC would be allowed "voluntarily" to join the consortium by contributing $5 million. In a parallel Track II proceeding, applicants would prosecute their individual applications, after establishing their financial qualifications. This approach, however, does not satisfy our public interest objectives, discussed below, of expeditiously awarding an MSS license so that the international coordination process can continue.

26 326 U. S. at 327.

27 *Id.* at 333.

28 351 U.S. 192 (1956).

29 La Star Cellular Telephone Co. v. FCC, 899 F.2d 1233, 1235 (D.C. Cir. 1990), *citing Ashbacker*, 326 U.S. at 333. The *Ashbacker* Court also suggested that comparative hearings might not be necessary if the Commission could make "workable adjustments so that both applications can be granted." 326 U.S. at 332. *See also* Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d

14. In this instance, the Commission exercised its rulemaking authority when it determined in the MSS proceeding, after notice and full opportunity for public comment, that the public interest would best be served by licensing a consortium of all qualified, willing MSS applicants rather than selecting one applicant as a licensee from among the twelve individual applicants by comparative hearing or lottery.[30] Stated another way, the Commission's rule established as a threshold service requirement for MSS that the service be offered only by a consortium of all the eligible applicants.[31] This procedure appears fully consistent with the *Storer* decision and thus appears to satisfy established legal requirements for denying any MSS applications that do not meet the consortium requirement. The rule itself obviates the need to hold full section 309(e) hearings, comparative or otherwise.

15. Furthermore, the fact that MSS applications already were pending at the time the consortium rule was promulgated does not in any way render the principles of the *Storer* decision inapposite to the MSS proceeding. The ownership rule at issue in *Storer* that avoided the need for a section 309(e) hearing also was applied to an application that had been filed prior to the rule's adoption. Therefore, the consortium requirement, promulgated through the prescribed rulemaking process, was not inconsistent with any hearing procedures set forth in the Act as interpreted in the relevant Supreme Court decisions. We also note that the procedure used in the MSS proceeding did not upset any legitimate expectations of individual MSS applicants that they would be entitled to comparative consideration in a hearing. As the *ARINC* court concluded, the Commission gave adequate notice prior to inviting individual MSS applications that it might adopt a consortium rule that would obviate the need for a comparative hearing. [32] The rule thus resulted in no unfairness to any MSS applicant.

b. *General Rulemaking Authority Under the Public Interest Standard*

16. Section 303 of the Act provides that the Commission shall perform its rulemaking functions "as public convenience, interest, or necessity requires," and may "make such regulations not inconsistent with law" as necessary to carry out the provisions of the Act.[33] Since a consortium rule avoids the need for a Section 309(e) adjudicatory hearings, the only remaining legal issue is whether, as a matter of substantive policy, it is permissible under the broad public interest standard of the Act to adopt a licensing rule that limits eligibility for MSS to a consortium of the qualified applicants.

17. In its decision, the *ARINC* court indicated that there is a strong statutory presumption that comparative consideration is the process most likely to serve the public. Nevertheless, as the Supreme Court has made clear, section 303 of the Act does not define the term "public interest, convenience, and necessity."[34] The goal of the Act is "to secure the maximum benefits of radio to all the people of the United States," [35] but Congress granted the Commission broad discretion in determining how that goal could best be achieved.[36] Thus, the public interest standard of the Act is "a supple instrument for the exercise of discretion" by the Commission, [37] and permits the Commission to implement its view of the public interest standard so long as that view is based on consideration of permissible factors and is otherwise reasonable.[38] Under that broad standard, the Commission was authorized to impose the consortium rule.

18. As a preliminary matter, we recognize that, in considering among mutually exclusive applications in the terrestrial broadcast services, the Commission customarily has undertaken comparative hearings as a means of selecting the applicant that best serves the public interest. The court of appeals in the *ARINC* decision thus cited to, and relied upon, several court precedents that have addressed the Commission's policies for selecting broadcast licensees. The mobile-satellite service, however, is not a local broadcast service. We therefore need not, and do not, address here the extent to which the comparative hearing process has become incorporated in the public interest standard as a means of selecting among mutually exclusive terrestrial broadcast applicants.[39] Rather, we determine only whether, when establishing policies for selecting a common carrier satellite licensee for the mobile-satellite service, the Commission was required by statute to conduct comparative hearings as the exclusive means of effectuating the public interest. As discussed

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1551, 1555 (D.C. Cir. 1987) (*Ashbacker* found no "right" to comparative hearing but merely held the Commission must use the same set of procedures to process the applications of similarly situated applicants); *accord*.

30 *See* Report and Order, 2 FCC Rcd at 487, paras. 13-17 (1987).

31 In the *ARINC* decision, the court suggested that rather than establishing rules for all applicants, as permitted by *Storer*, the Commission established the MSS licensee itself by rule. Slip op., *supra* note 2, at 47. The Commission, however, did not award an MSS license to any applicant in the context of the MSS rulemaking. The MSS license grant was made in a separate authorization proceeding. *See* Memorandum Opinion, Order and Authorization, 4 FCC Rcd at 6041. The Commission in the rulemaking made a policy determination that any MSS license should be awarded only to a consortium of the qualified applicants. Consistent with *Ashbacker* and *Storer*, the Commission then applied that policy, even-handedly, to all of the pending applications. *Cf.* Maxcell Telecom Plus, Inc. v. FCC, 815 F. 2d at 1551. No application that conformed to that licensing scheme would be denied.

32 Slip op., *supra* note 2, at 44-45.

33 *See* 47 U.S.C. §§ 303, 303(f), 303(r). *See also* section 309(g), 47 U.S.C. § 309(g), authorizing the Commission to adopt reasonable classifications of applications to effectuate the purposes of section 309 as a whole.

34 *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).

35 National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943).

36 FCC v. WNCN, 450 U.S. at 594.

37 FCC v. Pottsville Broadcasting Co., 309 U.S. 134,138 (1940).

38 FCC v. WNCN Listeners Guild,450 U.S. at 594, *citing* FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

39 Even when the Commission selects among competing broadcast applicants, comparative attributes are not the only permissible factors that the Commission may take into account when reaching licensing decisions under the public interest standard. *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 805-806, and n. 24 (1978) (even where challenger offers greater potential in terms of diversification, past performance of the incumbent is the most important factor in deciding whether to grant license renewal, in part to avoid private losses that discourage investment in quality service).

below, we find no manifestation of congressional intent, either express or implied, that comparative hearings are required in these circumstances.

c. The Public Interest Standard in the Context of Satellite Licensing

19. In contrast with terrestrial broadcast services, there is no longstanding Commission tradition of awarding satellite licenses through comparative hearings. To the contrary, throughout the history of the Commission's consideration of satellite licensing policies, the Commission consistently has recognized that the unique characteristics of the satellite service render it infeasible to select satellite licensees through comparative hearings. There is thus no historical or traditional basis for assuming that Congress has come to expect the use of comparative hearings to select satellite licensees.

20. The history of the Commission's licensing policies for domestic satellites is well known.[40] Briefly, the Commission promulgated its first licensing policies for the domestic satellite service in 1972, and it therein adopted the recommendations of a Staff Report and of public commenters that comparative hearings not be used to select among satellite applicants.[41] The Commission instead adopted an "open skies" policy, permitting multiple entry by qualified applicants while imposing minimal technical constraints. Among the factors that influenced the staff and Commission at that time was a concern that rapidly developing technology in the satellite field would probably make obsolete the technical plans on which any comparison and the Commission's findings would be based.[42] Further, and of critical importance, the time involved in conducting lengthy comparative proceedings would cause a substantial delay in the provision of any domestic satellite service to the public.[43] A decade later, in 1983, the Commission more fully articulated its policy of favoring alternative procedures over comparative hearings for satellite applications. The Commission made clear that its policy rests on an explicit finding that, even assuming the Commission could assure through comparative hearings that grants are awarded only to the best qualified applicants, this possible benefit would be more than offset by the harm to the public interest that would result from incurring substantial delays in the commencement of any additional satellite service."[44] The Commission explained that its policy choice was influenced in part by the long lead time required for satellite construction and launch, which, when coupled with the time that would be consumed in comparative administrative hearings to award construction permits, would produce unacceptable delay in the provision of satellite service.[45] In addition, the Commission sought to promote maximum flexibility in the technical adaptability of satellite licensees, which, in the Commission's view, was fundamentally at odds with a comparative process that would necessarily base technical comparisons on specific proposals submitted well before the actual service could begin.[46] In sum, on the basis of its assessment of the unique public interest considerations that pertain to satellite services, the Commission has a longstanding and deliberate policy with respect to this service of avoiding "traditional administrative procedures, such as comparative hearings, that have been used in other services that we regulate."[47]

21. The court of appeals, moreover, has explicitly approved the Commission's general policy of avoiding administrative hearings in satellite licensing. In a different context not involving claims of entitlement to section 309 comparative hearings, the D.C. Circuit sitting *en banc* relied on these policies when it upheld the Commission's decision not to conduct a section 309(e) evidentiary hearing on the potential antitrust consequences of a satellite authorization. Although the court rendered its opinion in a context that did not require it to balance the public interest in comparative hearings against the problems of procedural delay, it clearly recognized that delays in authorizing service have unique and important public interest consequences in the satellite context that may outweigh the public interest in section 309 administrative hearings. The court thus emphasized that:

> . . . the FCC has consistently acted without evidentiary hearings during the course of domestic satellite communications decisions. . . . Throughout the proceedings the FCC has emphasized the importance of getting satellite communications systems under way without procedural delay. This court has approved this FCC policy when it was challenged before. *Network Project v. FCC*. . . [511 F.2d 786]. In view of this consistent policy. . . adopted by the FCC, and affirmed by this court, appellants bear a heavy burden of explaining why a change is in order now.[48]

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[40] *See generally* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980 *en banc*).

[41] *See* Second Report and Order, Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities, 35 FCC 2d 844, 850 at para. 17 (1972).

[42] *See* Proposed Second Report and Order Recommended by the Chief, Common Carrier Bureau, 34 FCC 2d 9, 32 at para. 56 (1972). In surveying the satellite applications then before it, the Staff Report also noted that no one proposal stood out as "obviously superior to all the others on all counts." *Id.* at para. 5.

[43] *Id.* at para. 56. At the time, the Commission adopted the staff's proposal for a limited "open entry" policy for the satellite service and decided against the staff's alternative proposal to require the applicants to consolidate certain portions of their proposals. The Commission's decision was based on its desire to avoid prescribing the structure of any space segment operations, consistent with its overall policy of promoting maximum technical flexibility. 35 FCC 2d at 850, para. 17. A year later, however, the Commission did decide to require a consortium for provision of the Marisat satellite service, discussed *infra*.

[44] *See* Processing of Pending Space Station Applications in the Domestic Fixed Satellite Service, 93 FCC 2d 832, 842-43 at para. 23 (1983).

[45] *See, e.g., id.* at 837, para. 17. Practical constraints require a minimum of 2 1/2 years between execution of a spacecraft manufacturer's contract and launch of the satellite. *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 58 RR 2d 1267, 1275, n. 37 (1985). AMSC, for example, estimated that it would be over four years from grant of its license to launch of its first MSS satellite. *See* Memorandum Opinion, Order and Authorization, 4 FCC Rcd at 6058, para. 116.

[46] *See* 93 FCC 2d at 838, para. 17; 34 FCC 2d at 32, para. 56.

[47] 93 FCC 2d at 839, para. 19. We recognize that in some situations the Commission has adopted policies for satellite service that accommodated all who applied, and thus there was no situation of mutual exclusivity. These policies, however, clearly underscore the lengths to which the Commission went in order to avoid administrative hearings for satellite authorizations.

[48] *United States v. FCC*, 652 F.2d 72, 92 (D.C. Cir. 1980 *en banc*).

22. In addition, virtually from the outset of the satellite services, the Commission has consistently interpreted the public interest standard of the Act as permitting it to require a consortium for satellite services.[49] In 1973, nearly two decades ago, and only one year after authorizing the domestic satellite service, the Commission required Comsat and three maritime carriers to form a joint-venture for the provision of the MARISAT maritime satellite system.[50] Apart from the MSS and MARISAT decisions, the Commission also required a joint venture in a mutually exclusive application context when in, 1984, the Commission required competing applicants to form a joint venture to provide common carrier satellite earth station facilities in the Alaskan bush communities.[51]

23. In sum, the Commission has a long-standing, well known, and consistently-held policy of avoiding authorization hearings, comparative and otherwise, in the satellite licensing context. The Commission similarly has an established policy that common carrier applicants may, in limited circumstances where the public interest requires, be required to form consortiums for the provision of service to the public.[52] In view of these longstanding and consistent policies, our use of a consortium instead of comparative hearings in this context is a permissible exercise of our broad discretion under the public interest standard of the Act.

24. Finally, we note that the *ARINC* court concluded that the delay associated with comparative hearings is a burden Congress found to be outweighed by the benefits of a reasoned assessment of the public interest, and thus does not justify the Commission's avoidance of a comparative procedure.[53] As discussed below, the Commission's decision to authorize a consortium was, and is, based on a fully reasoned assessment of the public interest.

25. We further note that through the 1982 amendments to the Communications Act authorizing lotteries, Congress itself has indicated that the benefits of conducting comparative hearings are not always paramount and may be superseded by the substantial public interest in expediting early authorization of service to the public. The legislative history thus indicates that lotteries would "alleviate many of the delays and burdensome costs faced by both applicants and the Commission in an initial comparative licensing proceeding with mutually exclusive applicants."[54] Congress' assessment in the lottery amendments of the public benefits of comparative hearings, in comparison to the benefits of expediting service to the public, lends support to the manner in which we have balanced public interest factors in the MSS rulemaking proceeding, through our similar determination that an overriding public interest in prompt authorization of MSS -- by a consortium -- outweighs the benefits of comparative hearings.

26. In authorizing the selection of licensees purely by random selection, Congress also indicated that lotteries, in lieu of comparative hearings, may be used for satellite services.[55] Although we have chosen a consortium rather than using lotteries for the mobile-satellite service,[56] we believe it would be unjustified in these circumstances to conclude that any public interest benefits of comparing individual applicants must take precedence overall other public interest factors that influence our licensing policies for the mobile-satellite service.[57]

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[49] *See* slip op., *supra* note 2, at 47 n. 73.

[50] *See* Comsat Corporation, 40 FCC 2d 496 (1973). Even prior to the MARISAT decision, the Commission hadindicated that it was empowered to require joint-ownership arrangements in appropriate circumstances. *See* Report and Order, Establishment of Domestic Communications-Satellite Facilities by Nongovernmental Entities, Appendix C - Memorandum on Legal Issues, 22 FCC 2d 86,130 (1970).

[51] *See* Final Decision and Policy Statement, 49 FR 9727 (March 15, 1984).

[52] This history reflecting the Commission's limited use of consortiums does not substantiate the *ARINC* court's concern that the Commission might impose a consortium requirement in every license proceeding and thereby render comparative hearings a nullity. The Commission has required consortiums only when it has found public interest reasons for doing so. The Commission has no intention of adopting a rule that requires the use of consortiums for every type of licensing proceeding for every service, nor would it be either practical or appropriate to do so. For example, although we occasionally have authorized joint services on an interim basis in the broadcast services, requiring a consortium would not be a suitable permanent approach for services whose operations hinge on the editorial discretion of the licensee.

[53] Slip op., *supra* note 2, at 50.

[54] H. R. Rep. No. 765, 97th Cong., 2d Sess. 37 (1982).

[55] H. R. Rep. No. 765, at 41 (FCC may decide to use lottery for direct broadcast satellite services).

[56] In the Second Report and Order in the MSS proceeding we stated it was "not clear" that the statutory requirements for using a lottery could be met. 2 FCC Rcd at 487, para. 16. On further reflection, we believe we would be permitted to use a lottery in these circumstances. Under the relevant factors mentioned in the legislative history of the lottery statute, H. R. Rep. No. 765, 97th Cong., 2d Sess. 37 (1982), there is reasonable justification for using a lottery. *See also* Telecommunications Research and Action Center v. FCC, 836 F. 2d, 1349, 1362 (D.C. Cir. 1988) (factors cited in legislative history of lottery statute do not rise to level of binding statutory requirements). As discussed in greater detail below at note 57, we continue to believe that authorizing a consortium here is preferable to a lottery.

[57] In the Second Report and Order, we determined, as a matter of policy, that requiring a consortium was preferable to using a lottery. 2 FCC Rcd at 487, para. 16. For the reasons stated therein, we continue to believe that authorizing a consortium is preferable to a lottery. As we indicated in the Second Report and Order, instituting a lottery would involve additional delays resulting, in part, from our statutory duty to determine if the individual winner were financially qualified. In this regard, we note that our decision to use a consortium rather than lotteries, was supported, in part, by our desire to ensure the financial ability of the MSS licensee, which, as discussed below, is best achieved through a consortium. We believe our decision to require a consortium, rather than use lotteries, is a permissible exercise of our rulemaking authority. We find, for example, no indication that the lottery statute was intended to limit our pre-existing rulemaking authority, as exercised herein. The licensing scheme we have chosen for the common carrier MSS service is not a "system of random selection" governed by the specific provisions of the lottery statute, nor is it inconsistent with any of the provisions of the lottery statute, such as the minority and media ownership diversity preferences. *Compare* Telecommunications Research and Action Center v. FCC, 836 F. 2d at 1358 - 1361. Nor do we have any reason to believe that Congress has determined, under thebroad public interest standard, that the purely arbitrary selection mechanism of a lottery is preferable to a consortium in these circumstances.

27. We conclude there is no statutory prohibition to our requiring that MSS be provided by a consortium. Neither the statutory language itself, nor any prior formulations of the public interest standard, by Congress, the Commission or the courts, require or even support such a prohibition. Rather, our decision to use a consortium is fully consistent with our prior interpretations of the public interest standard, and, moreover, with Congress' own balancing of public interest considerations in the lottery amendments to the Communications Act. We thus conclude that a consortium rule is a permissible exercise of our broad rulemaking authority under the public interest standard.

d. The Reasonableness of Imposing a Consortium Requirement

28. Having established that the Commission has the statutory authority to license a consortium in lieu of holding comparative hearings, we next demonstrate that mandating a consortium, particularly as amplified herein, is a permissible implementation of the public interest standard because it "is based on a consideration of permissible factors and is otherwise. reasonable."[58] Specifically, as discussed below, paras. 33-53, there is a compelling public interest reason to ensure prompt authorization of an MSS licensee without the necessity of further time consuming administrative proceedings.[59] Unless we are prepared to go forward with an authorization in the very near future, international considerations render it very unlikely that we will be able to implement a domestic mobile-satellite service in the upper L-band.

29. In addition, we have determined that the possible benefits of comparative proceedings as a means of selecting the most "technically" superior MSS proposal either are virtually non-existent or are outweighed by other public interest considerations in this proceeding. One of our purposes in requesting MSS applications at the time we began this rulemaking proceeding was to determine whether specific technical configurations should be mandated.[60] As discussed below, paras. 50-60, none of the applicants' technical proposals was clearly superior to the others. Even if one proposal had been found technically superior, however, it does not follow that comparative proceedings were the only means of implementing the benefits of that proposal, at a cost of unacceptably delaying the MSS authorization. Any technical requirements that we have deemed necessary, or in the public interest, for the mobile satellite service have been imposed by rule, or otherwise, on the consortium.

30. Indeed, in the *Notice* we sought comment on technical requirements and expressly stated that "[e]ach application should be viewed as a proposed system standard, and parties should focus on whether the proposal is in the public interest. The resulting record is intended to provide the basis for Commission specification of any necessary design and operating standards, as well as terms and conditions of any system."[61] Thus, the Commission expressly contemplated that, after reviewing the MSS applications, technical requirements derived from the several applications might be imposed by rule.

31. At the conclusion of the rulemaking, we did impose on the mobile-satellite service certain basic technical requirements.[62] After obtaining full public comment, we imposed additional requirements on the consortium's specific proposal in the subsequent application proceeding.[63] This procedure, we believe, afforded the same or greater public benefits than might have been obtained by comparing technical proposals in hearings, without the drawbacks of significant delays in authorizing the mobile-satellite service. Specifically, through the rulemaking procedure and subsequent application proceeding, we fully ensured that the public received all technical benefits that we determined to be in the public interest for the mobile-satellite service.

32. Finally, given the enormous projected costs of the satellite system, which the Commission estimated at the time to be, at minimum, between $300 and $400 million, and the unproven nature of the service, the Commission concluded that a consortium, which would allow the costs of the service to be shared, was the approach most likely to ensure that the system was actually implemented in a timely manner by a financially qualified applicant. Because only one MSS license was to be awarded, it was especially important to ensure the financial ability of the licensee.[64] For these reasons, and the additional reasons discussed below, we thus conclude that imposing a consortium requirement was, and is, a permissible and reasonable exercise of authority under the public interest standard of the Act.[65]

3. Compelling Considerations

33. In view of our statutory authority to impose a consortium requirement and the reasonableness of having done so in this instance, we next set forth, in detail, the compelling public interest reasons underlying our decision. We demonstrate that a consortium approach is the only method certain to ensure that new and needed mobile satellite services are made available, through a domestic licensee, to both the United States government and private citizens. If the United States intends to have a

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[58] FCC v. WNCN Listeners Guild, 450 U.S. at 582.

[59] In the *ARINC* decision, the court of appeals indicated the Commission must have a "compelling" justification to depart from the comparative hearing approach for awarding licenses, and we have such compelling reasons here. We observe, however, that Congress itself has determined that the Commission may use lotteries, and dispense with comparative considerations altogether, simply in order to avoid the delays and expenses associated with initial comparative licensing proceedings for non-broadcast services.

[60] *See* Notice of Proposed Rulemaking, 50 Fed. Reg. at 8149, para. 52.

[61] *Id.*

[62] *See* Second Report and Order, 2 FCC Rcd at 489, paras. 25-29.

[63] Memorandum Opinion, Order and Authorization, 4 FCC Rcd at 6053-6056, paras. 82-102.

[64] *See* Second Report and Order, 2 FCC Rcd at 487-492, paras. 13, 23, 47, and n. 38. The consortium's proposed system is projected to cost $800 million. *See* Memorandum Opinion, Order and Authorization, 4 FCC Rcd at 6061, n. 38.

[65] We do not restate here the additional public interest reasons for the consortium requirement mentioned in the Second Report and Order, 2 FCC Rcd at 486-87, paras. 10-16, but incorporate them by reference herein.

domestic system, we believe the public interest demands that we ensure prompt authorization of an MSS licensee so that the United States can continue as an active participant in the international frequency coordination process for MSS systems. Any other course, such as delaying an MSS authorization pending the completion of comparative hearings, will very likely preclude entirely the ultimate authorization of a domestic MSS system in this band.

34. In particular, in order to ensure sufficient spectrum for a domestic MSS system in the upper L-band, the United States must successfully complete the ongoing international frequency assignments and coordination process for MSS systems. As explained below, effective United States participation in this coordination process is not possible without the active assistance and presence of a U.S. authorized licensee at coordination meetings. Furthermore, if the United States does not continue its participation, assisted by a licensee, other countries pursuing the coordination of their own systems will nevertheless continue with the process. Because there is already only a limited amount of spectrum to accommodate the needs of all countries currently engaged in MSS coordination, the United States' failure to participate at this juncture will, in all likelihood, prevent it from obtaining sufficient spectrum at a later time. Simply put, other countries will already have negotiated agreements regarding this spectrum in the coordination process, leaving insufficient remaining spectrum to meet the United States' needs.

35. The foregoing international considerations that necessitate an expeditious authorization process for the mobile satellite service existed in 1987 when we issued the *Second Report and Order*. Those considerations, however, have become far more significant today, now that the coordination process is at a critical juncture. The 1987 *Second Report and Order* explained that comparative hearings would be an unduly time consuming process, but we did not find it necessary, or even desirable, to set forth in our decision the international considerations that applied in the MSS context.[66] As a consequence of the *ARINC* court's decision, however, we believe it is necessary to explain the international constraints that apply to the mobile-satellite service and how those considerations now affect the licensing option we have selected.[67] Therefore, by way of explanation, we first describe briefly below the general international process for coordinating satellite services. We next describe the current status of the MSS coordination process and how that process has affected our public interest determination in this proceeding. We conclude with an analysis of why selection mechanisms other than a mandatory consortium would disserve the public interest.

a. Need for Licensee Participation in the Coordination Process

36. The need to proceed with a consortium stems from the international frequency coordination process. The U.S. is under a treaty obligation, in connection with its membership in the International Telecommunication Union (ITU), to coordinate all U.S. authorized satellite systems.[68] The ITU's coordination procedures are intended to ensure that the operations of one country's satellites do not cause harmful interference to the operations of another country's satellites. Once a system has been properly coordinated with the ITU, it is entitled to international recognition and is protected against interference from all other existing and future satellites. If a system has not been successfully coordinated, it is obligated to avoid interfering with other properly coordinated systems. Moreover, such an uncoordinated system receives no protection from interference caused by other satellite systems. [69]

37. The procedure that is used to achieve international coordination for geostationary satellites is complex and time consuming. Both the orbital location for the satellite and the proposed frequencies must be approved by the ITU.[70] The procedure for effecting coordination is a three step process consisting of (a) advance publication, where a country makes known its plans to implement a satellite system in particular frequencies, (b) coordination, where technical agreements are negotiated and reached among countries to ensure the interference-free operations of the planned satellites, and (c) notification and recording of the frequency assignment in the Master International Fre-

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[66] The *ARINC* court concluded that a general concern for delay is an insufficient public interest basis for dispensing with comparative hearings. We recognize that our earlier decision, in reciting the need for avoidance of delay in the authorization process, failed to articulate the unique concern for undue delay in the satellite field (because of the long lead time required for satellite construction and launch) that is discussed above. Nor did we address the specific international considerations relating to the MSS authorization process, discussed below.

[67] As should become apparent from the discussion below, by 1986, when the Commission adopted the Second Report and Order, international considerations prompted a concern for expeditious action in issuing an MSS authorization, simply in order to meet the six year time frame for coordination specified in international regulations. As a general matter, however, when international coordination progresses, the need for expedition may become greater, because of factors that are outside the Commission's control or ability to predict. For example, the need for speed in the satellite authorization process is greatly affected by how quickly other countries are proceeding with the actual logistics of coordinating their own systems, both with the United States and with other countries. Because such matters cannot be predicted with certainty, the public interest may require that the United States position itself so that it can participate effectively in the process, as circumstances demand. For example, had the Commission decided in 1987 to conduct comparative hearings among the twelve MSS applicants, given the unfolding international developments, the U.S. would have had little assurance that the authorization process could be completed in sufficient time to enable effective U.S. participation in international coordination. We do not decide here, however, whether the international considerations that existed in 1987 would have supported our authorizing a consortium. We simply decide that the international situation, as it exists today, is a primary factor that clearly supports our decision.

[68] *See* Final Acts of the World Administrative Radio Conference for Space Telecommunications, Geneva, 1971. Because orbital locations and spectrum must be shared among nations and because satellite coverage areas cross national boundaries, international procedures have been developed to ensure that interference levels remain acceptable when accessing the orbit-spectrum resource.

[69] *See* ITU Regulations RR 341 and 342 and Article 22.

[70] The framework for effecting coordination is prescribed in Articles 11 and 13 of the ITU Radio Regulations.

quency Register (Master Register) by the International Frequency Registration Board (IFRB), which is a branch of the ITU.

38. Advance publication is initiated when a country forwards certain basic technical information to the IFRB. The primary purpose of advance publication is to alert other countries to the proposed usage and to identify potential interference problems early in the planning stages of the proposed system.[71] The country planning the satellite is afforded six years from the date of advance publication in which to coordinate the satellite and to bring it into use, although a three year extension of this deadline may be granted. If coordination is not completed in this time frame and the satellite has not been launched, the IFRB will cancel the entry and the advance publication process must be initiated again, subordinate to all other entities that have begun the process in the interim.

39. After advance publication, the next stage is coordination of the system with other planned and existing satellite systems that have been identified in the advance publication process. Coordination is initiated when a country has more detailed information on its system that is forwarded to the IFRB.[72] The IFRB then publishes the coordination information in its weekly circular as a means of notifying all affected parties.

40. Once the coordination request has been published by the IFRB,[73] affected countries either agree that the specific technical proposal will not cause harmful interference, or forward technical details upon which they base their disagreements. While fairly simple coordinations can often be completed in two years, more complicated coordinations can take much longer. Acoordination is most difficult if more than two countries are involved, if the entities planning the systems seek to operate using the same frequency bands and those bands cannot be "re-used,"[74] and if the collective needs for spectrum exceed the spectrum available. Given such a scenario, developing a cohesive set of mutually satisfactory operational agreements is an arduous, often contentious, and extremely lengthy process.

41. If there is disagreement in the coordination process, a series of bilateral, or occasionally multilateral, negotiation meetings follow. During these negotiations each country sets forth its particular spectrum requirements and identifies potential interference problems. Possible solutions to interference problems are proposed, examined, modified, and eventually accepted by the affected countries. Reaching a coordination agreement usually requires a series of several meetings, although more difficult coordinations can require many more. Scheduling meetings between the affected countries is often logistically difficult and technical and other administrative follow-up work is generally required between meetings.

42. In all but the most simple coordinations, it is imperative that the U.S. licensee participate in the coordination process together with Commission personnel.[75] While the Commission leads the discussions, a licensee must be present for several reasons. First, the licensee must make specific technical and economic decisions and related concessions. Coordination agreements are necessarily specific and, indeed, may affect the ultimate viability of the system being coordinated. For example, agreements typically may require the licensee to carry certain types of information traffic on certain frequencies and transponders on the satellite. An agreement could also require a licensee to reduce transmission powers or make other modifications to the satellites, or, in certain cases, to accept higher levels of interference or to refrain from operating at specified frequencies. As a practical matter, these technical and economic tradeoffs cannot be made by the Commission. They must be made by the licensee who can appropriately evaluate its unique customer requirements, business forecasts, and marketing strategies. Second, a licensee must be present to provide adequate assurance that the coordination agreement actually will be adhered to. International parties to the negotiation must have confidence that any operating agreements reached will be carried out. This confidence is secured only through the presence of the responsible entity. Finally, a party generally will not accept operating constraints on its system unless it believes that the other party has a real requirement that will be implemented. Indeed, as a practical matter, coordination negotiations do not proceed to the agreement stage absent evidence of another country's concrete proposal. Thus, a country with no definitive plans may not proceed to the next stage of the process.

43. When a coordination agreement has been reached, the affected countries confirm the agreement and submit any modification of the satellites to the IFRB for notification and recording in the Master Register. This entitles the coordinated satellites to international recognition and protection against harmful interference from other satellites. Under the ITU Radio Regulations, the notification information may be submitted to the IFRB not earlier than three years and not later than three months before the satellite is to be brought into use. Once all the affected countries have agreed and all ITU Regulations have been complied with, the assignment is recorded in the Master Register. The date of the receipt by the IFRB of the original coordination request establishes the rights of the assignment.

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[71] The other method by which satellites can be recognized internationally is through an allotment plan developed and adopted by a specialized ITU World Administrative Radio Conference (WARC). This procedure is not involved in the coordination of an MSS system in the upper L-band because locations in the upper L-band are not subject to an allotment plan.

[72] The required information is listed in Appendix 3 of the ITU Radio Regulations. It includes detailed technical parameters such as satellite antenna characteristics, signal type, modulation characteristics and transmitter power level.

[73] A country that has not been included in the coordination process may request to be brought into the procedure if it believes it is affected.

[74] Technical factors often permit the same spectrum to be used by multiple systems with no interference problems. For example, in the fixed-satellite service, stationary earth station antennas can point directly at and transmit to particular satellites without causing interference into adjacent satellite operations.

[75] Because satellite systems of other countries are generally implemented either directly or indirectly by that country's government, the U.S., with a myriad of independent commercial licensees, is in a unique position internationally.

b. Coordination of the U.S. MSS System in the Upper L-band

44. The international coordination process for a United States MSS system has proceeded on a parallel course with this rulemaking proceeding. On March 18, 1986, after issuance of the 1985 *Notice* in this proceeding, but before the MSS frequencies were allocated domestically, the United States initiated the international registration process by submitting advance publication information to the IFRB for three generic geostationary MSS satellites. The United States took prompt action to protect its interest in using this spectrum because it appeared that at least two MSS systems proposed by INMARSAT and the USSR might result in harmful interference to a U.S. system. Specifically, in February 1986, INMARSAT, an international consortium of member nations that provides international maritime mobile-satellite communications, had indicated its interest in providing aeronautical mobile-satellite communications on 3 MHz in the upper L-band.[76] (The United Kingdom, on behalf of INMARSAT, had previously begun coordination for 1 MHz of the upper L-band in October 1985.) In June 1985, the USSR also submitted to the IFRB advance publication information for its proposed global Volna mobile satellite system, which was to operate in the upper L-band. By February 1986, the United States had filed comments on the USSR satellite system, indicating that harmful interference was expected to the United States' planned use of the upper L-band.

45. In light of the above developments, the Commission and the Executive Branch's representative on these matters, the National Telecommunications and Information Administration (NTIA), signed a Memorandum of Understanding in March 1986 in which the agencies agreed to submit advance publication information demonstrating U.S. intentions to use the upper L-band.[77] This information was submitted to the IFRB shortly thereafter, and on May 20, 1986, the IFRB advance published the three satellites. This means that, at the outermost, the U.S. has until May 1995 to complete coordination and launch the U.S. MSS system.[78]

46. INMARSAT, the USSR, and others filed adverse comments with the ITU on the U.S. system. In addition, in October 1986, Canada began coordination of its own L-band MSS system. Two months later, in December 1986, the Commission adopted the *Second Report and Order*, and expeditiously resolved the licensing issues for the mobile-satellite service by deciding on a consortium approach rather than time-consuming comparative hearings or a lottery. Next, because of the rapidly escalating international activity involving the upper L-band, the Commission, in March 1987, quickly began the coordination phase for the three satellite domestic MSS system. The Commission developed more detailed information based on the geostationary MSS applications that had been submitted in this proceeding, and submitted this information to the IFRB. At the same time, the U.S. submitted requests for coordination to Canada, Japan, INMARSAT, and the USSR.[79] The USSR began the coordination of its Volna system in this time frame as well.[80]

47. During the period after issuance of the *Second Report and Order*, the Commission ruled on petitions for reconsideration, various procedural appeals, and finalized technical aspects of the consortium's application. AMSC's license was issued on May 31, 1989. Since that time, the Commission has participated in six international coordination meetings with the assistance of AMSC. Meetings have been held at least once with each of the three other entities currently implementing upper L-band MSS systems, and additional meetings are scheduled with INMARSAT and Canada in the summer of 1991.[81] Coordination efforts for the U.S. system thus are proceeding apace, but the U.S. is now at a critical juncture in the ongoing process. Our bilateral negotiations with INMARSAT, the USSR, and Canada during the last year have become increasingly detailed, with the focus on operational considerations and compromises.[82] The re-

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[76] In 1983, INMARSAT requested its council to consider permitting it to use 1 MHz of spectrum in the upper L-band in each transmission direction (Earth-to-space and space-to-Earth) to demonstrate the feasibility of aeronautical mobile-satellite services. In 1985, INMARSAT's charter was expanded to allow it to provide international aeronautical mobile-satellite communications on a regular basis. In the same year, INMARSAT awarded a construction contract for its second generation space segment. In February 1986, INMARSAT expanded its request to its council to use 3 MHz in the upper Lband in each transmission direction.

[77] The Memorandum stated that "[t]his action is not viewed as reflecting priority of any of the forementioned plans and will not prejudice the future allocation of these frequencies." Further, the Commission's Public Notice of our intention to advance publish three generic MSS satellites stated that "it must be recognized that these [advance publications] do not reflect priority for any of the applicants or for the [Federal Aviation Administration's] concepts and ideas, and will not prejudice the outcome of FCC Docket 84-1234."

[78] The 1995 date assumes the United States would be granted a three year extension. *See* para. 38, *supra*. It is important to recognize that, in order to meet these time constraints, a construction permit must be issued to a licensee many years prior to the deadline. First, as discussed above, the coordination process may span several years and requires that a licensee be present. In addition, after grant of a satellite construction permit, it may take many years before the satellite can be launched. *See* note 45, *supra*. More importantly, as discussed below at paras. 48-53, if the U.S. is unable to retain an active role in the currently on-going international coordination meetings, there is no realistic possibility that U.S. spectrum needs will be accommodated at a later time.

[79] Japan subsequently decided not to proceed with its planned system in these bands.

[80] During this early phase of coordination, the Commission informally discussed possible approaches to coordination, general requirements and anticipated coordination problems with Canada and INMARSAT.

[81] Meetings were held with Canada in August 1989, February 1990, and March 1991; with INMARSAT in March 1990 and November 1990; and with the USSR in May 1991, a meeting that took over one-and-a-half years to arrange. Because the four planned systems present related and interdependent interference concerns, it is often necessary to meet with a different entity before a follow-up meeting with the first entity can be productive. This has created significant scheduling and logistical problems.

[82] We will soon begin coordination with Mexico, Australia and Papua New Guinea who have indicated their intent to imple-

maining negotiations will involve final decisions on technical, economic and spectrum tradeoffs. [83] As explained below, the U.S. can successfully complete this process only if a U.S. licensee is present at the upcoming meetings. Our ultimate goal is to complete coordination in a timely manner, and to procure sufficient spectrum with sufficient operational flexibility to support a domestic system. We are progressing towards this goal and fully expect to be successful.

c. Current Public Interest Considerations

48. In light of the *ARINC* court's decision, we have carefully considered whether it would be feasible to achieve our objective of securing sufficient spectrum internationally for a domestic MSS system and, at the same time, select an MSS licensee by comparative hearings. We believe that, given the current status of international coordinations, such an approach is not a realistic option. As discussed below, if the U.S. does not participate at this juncture, later coordination is likely to be impossible because most, if not all, of the spectrum involved will have been divided up in coordination discussions among the remaining nations and INMARSAT and brought into use.

49. The U.S. cannot return to coordinating a U.S. system in the upper L-band solely on a government-to-government basis while a comparative hearing or a lottery is held on the various MSS proposals. Negotiations are far too advanced to return to coordinating a "generic" U.S. system. The specific technical parameters of the planned MSS systems -- including AMSC's -- have already been presented during past negotiations, and solutions to specific interference problems will be the subject of ongoing discussions that will be addressed at the next group of meetings.[84] Thus, detailed commercial decisions that will directly affect the viability of the domestic system must be made in the coming months -- decisions that require the direct participation of a U.S. licensee.

50. Moreover, even if the Commission's negotiating team attempted to make these decisions on behalf of some future licensee and the United States were not accompanied at meetings by an actual licensee, our negotiating position would be severely weakened. As discussed previously, other countries, which are already in various phases of construction, will make few, if any, operational concessions unless the U.S. supports its claim of need with a concrete MSS system backed up by actual business plans, and not merely with a hypothetical MSS proposal.

51. Given the necessity of participation by a U.S. licensee at this stage, the Commission cannot simply delay its coordination meetings while it conducts a comparative hearing and chooses a licensee. Evidentiary hearings are likely to take, at best, many months and, more likely, several years. Even expedited, largely paper hearings, such as those employed in the cellular service, would result in undue delay. Global, who advocates this approach, itself estimates that a "cellular-like" hearing could take up to two years.[85] During the time that it would take to complete a comparative hearing, however, other countries and entities building their MSS systems, and others that have expressed their intention to do so, will be proceeding with implementation. These entities have been coordinating their systems for several years and will continue to do so in accordance with established and binding ITU procedures, regardless of the status of the U.S. domestic system. Indeed, the absence of the U.S. system would merely facilitate coordination of the remaining systems and division of the available spectrum among them.

52. Although, in theory, the U.S. can reopen coordination procedures until 1995, the complexities of upper L-band coordination would render it virtually impossible to complete coordination and bring a system into use by 1995 unless the U.S. continues with the currently scheduled meetings. Importantly, other countries will have finalized agreements in the interim and construction and design decisions will have been made that will limit their ability to accommodate U.S. needs. Given the limited spectrum and the interdependent technical constraints that are necessary for interference-free operations, accommodating a new system after specific operational parameters have been negotiated for other systems would be difficult, if not impossible. First, it would require that bilateral agreements be reopened. Moreover, it would require that additional constraints be imposed on previously coordinated systems, which those systems are not required to accept. Thus, the reality is that accommodations very likely will not be made to countries unable to participate throughout the entire process.

53. In sum, we believe the U.S., together with its licensee, must participate in the numerous bilateral and multilateral meetings scheduled over the next twelve months (e.g., Canada in August 1991 and INMARSAT in

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ment upper L-band MSS systems. Significantly, Mexico's planned transmission beams also will cover parts of the United States.

[83] Given the number of entities seeking to use a very limited amount of bandwidth -- and whose combined requirements exceed the bandwidth available -- and the technical considerations involved, negotiations are inherently difficult. Both omni-directional and semi-directional mobile user antenna units are required in a mobile service. Further, the transmission beams of the planned Canadian, USSR, and INMARSAT systems will all cover the United States. Because the omni-directional mobile antennas cannot differentiate between satellites operating on the same frequencies and because beams from several satellites will be covering the United States at the same time, it is impossible for the various planned MSS systems to use the same frequencies in North America. A coordination agreement must therefore include an arrangement that divides the upper L-band spectrum among the parties. Operational agreements must also be reached to ensure that systems operating on adjacent frequencies and in adjacent geographic areas do not interfere with each other.

[84] For example, mobile earth station and satellite transmitter powers must be adjusted to avoid excessive interference into other systems operating on adjacent channels or in geographic areas. High transmitter power carriers using omni-directional antennas must be identified for each system and assigned specific operating frequencies.

[85] *See* Global Submission of Views (April 10, 1991), at 5. A lottery would also entail delay as a new licensing scheme would need to be instituted and the qualifications of the winner examined. However, any delay greater than a few months would put the United States in a precarious position to secure sufficient spectrum for a domestic satellite system.

September 1991). Moreover, we must be prepared to schedule additional meetings, if our requirements for a domestic system are to be considered by the other entities as they proceed. The likelihood of other countries accommodating a viable U.S. domestic MSS system at a later date is small and diminishes even further as the planned systems continue to be implemented. A consortium approach is the *only* option at this time under which the United States can continue with international coordination. Failure to proceed in this way will, we believe, make it virtually impossible to secure sufficient spectrum with sufficient operational flexibility to support a U.S. domestic MSS system. The international considerations described above therefore lead us to our tentative conclusion that a rule requiring an MSS consortium is the approach that will best ensure that the U.S. obtains sufficient spectrum for a mobile-satellite service.

B. Technical Considerations

54. We next address the technological consequences of our decision to authorize a consortium. We believe AMSC's system, as described in its application and subsequent amendments, is as technically advanced as or more advanced than any other system that likely would have been authorized as a result of a comparative hearing. Our confidence in the technical aspects of the consortium's proposal thus further supports our tentative decision to proceed with a mandatory consortium. In this regard, the *ARINC* court's decision suggested that, through its consortium approach, the Commission may have deprived the public of a technically superior MSS system. [86] As explained below, this is not the case. [87]

55. The Commission staff thoroughly examined each MSS application when it was filed in 1985. While the Commission did not explicitly address in its orders the claims that certain applications were superior to all other alternatives, our initial examination of the applications did not demonstrate that any were, or that any would have evolved into superior systems. We briefly address below the three applications that were dismissed.

1. Global:

56. Global has argued that its application was demonstrably superior to those of the other applicants, and that the public interest could best be served only through a voluntary consortium based on Global's specific proposal. This is not the case. Four other applicants who later joined the consortium -- McCaw, MCCA, NAMS, and SMTC -- proposed systems very similar to Global's. In particular, all five applicants proposed to use large diameter satellite antennas ranging in size from ten or fifteen meters, coupled with multiple spot beams and matching transponders. Each transponder was to be equipped with high transmitter power to support a large user population. Although each application proposed a state-of-the-art system, none contained any specialized or innovative technology so as to render it significantly different than or superior to the others.

2. Globesat:

57. Globesat proposed a low-Earth orbit (LEO) satellite system. When the United States transmitted advance publication information for a generic MSS system consisting of three satellites to the IFRB in 1985, the satellites described were geostationary satellites.[88] At that time, the Commission did not believe it feasible to consider attempting to coordinate a LEO satellite system in the upper Lband. In fact, given the uncertainties that still exist for this sort of coordination and the interests at stake, we believe that a LEO satellite system in this band is still not feasible.

58. In light of the interest demonstrated by other countries in the upper L-band spectrum in the early-to-mid1980's, the FCC and NTIA agreed that it was imperative that the U.S. act quickly to protect its interest in these bands. [89] In 1985, no commercial LEO satellite systems had been launched or coordinated.[90] Because the interference considerations and other technical matters relating to LEO satellite systems differ significantly from those relating to geostationary satellite systems, the existing coordination procedures -- which apply only to geostationary satellites -- cannot be used. [91] Procedures to govern coordination of LEO satellite systems have not yet been adopted. In 1985, the Commission had no reason to believe that a timely international agreement adopting such procedures could be reached or even that LEO satellite systems could be successfully coordinated in this portion of the spectrum given their operational characteristics. These uncertainties and the need for the U.S. to proceedquickly and effectively to secure spectrum in the upper L-band, led us to conclude that a LEO satellite system was not a feasible option in 1985. Consequently, the U.S. advance published a geostationary MSS system.

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[86] Slip op., *supra* note 2, at 49.

[87] Even if it were true that one of the proposals below were superior to the consortium's, as indicated above, para. 29, the public interest in an expeditious authorization process outweighs the possible benefits that might be achieved through comparative hearings. As discussed above, the Commission also ensured the consortium's technical capability through the rulemaking and the subsequent authorization proceedings.

[88] Geostationary satellites revolve around the Earth over the plane of the equator at the same rate as the Earth rotates and therefore appear stationary from any given location on Earth. In contrast, LEO satellites orbit the Earth at lower altitudes and in various orbital planes. Consequently, LEO satellites do not appear stationary from a fixed point on the Earth and, in fact, pass over all countries in the plane of their orbits. Up to one or two dozen LEO satellites are needed if continuous coverage of a service area is to be provided. To provide continuous coverage, a new satellite must come into view from the particular service area as the first one disappears over the horizon.

[89] *See* para. 45, *supra*.

[90] The National Oceanic and Atmospheric Administration (NOAA) and NASA had launched several low-Earth orbit meteorological and scientific satellites. However, these satellites are only required to be advance published and notified -- no coordination is required with other satellite systems.

[91] Because LEO satellites pass over all parts of the world, coordination of these systems is a global issue and requires the cooperation of all countries with satellites-- both LEO and geostationary -- that operate in the same frequency band. In contrast, geostationary satellite coordination is a regional issue. For example, U.S. geostationary satellite systems need not coordinate with systems that serve countries on the other side of the Earth, such as Australia and India.

59. Coordination procedures for LEO satellite systems still have not been developed and questions as to whether coordination can be accomplished are still unanswered. While the U.S. is exploring the possibility of LEO satellite systems in other bands,[92] it does not have the luxury of considering them in the upper L-band. Domestically, the Commission has serious reservations that a LEO satellite system could satisfy the priority and preemption requirements for AMSS(R).[93] Internationally, changing the U.S. MSS system to a LEO satellite system would result in the U.S. losing priority in the ITU coordination process.[94] This would mean that the U.S., as the "last in line," would bear the burden of coordinating its LEO satellite system with the geostationary satellite systems that have been advance published and that are currently being built and coordinated. We have no reason to believe that coordination of proposed LEO satellite systems with operational geostationary satellites will be possible.[95] Thus, after consideration, we concluded that the Globesat LEO proposal for an MSS system in the upper L-band was not feasible in 1985 and similarly conclude it is not feasible today. Globesat's proposal, while technically. Sound, raises significant problems if implemented in the upper L-band spectrum.

3. Mobile Satellite Services, Inc.

60. The application filed by MSSI in 1985 was in no way superior to any of the others that had been filed. It was essentially a copy of the Mobilesat proposal submitted in 1983, which initiated this proceeding. MSSI admits in its application that in view of Mobilesat's suggestion that the Mobilesat proposal should serve as the "reference application" in this proceeding," a large portion of [MSSI's] document is the suggested reference application of Mobilesat" and that "[MSSI's] technical and expansion plan is identical to that of Mobilesat."[96] Significantly, Mobilesat itself later joined the consortium.

C. Entry Criteria

61. Having tentatively concluded that adoption of a mandatory consortium rule is in the public interest, we must consider entry criteria. In the *Second Report and Order,* we required that applicants make a $5 million cash contribution into the consortium as a condition for entry.[97] The court vacated the cash contribution requirement and reinstated the three applications that had been dismissed on this basis.[98] We tentatively adopt modified financial criteria for participation in the consortium and allow the three entities an opportunity to join pursuant to these standards.

62. The $5 million financial eligibility standard previously adopted by the Commission was designed to ensure sufficient resources to get the venture underway and an adequate capitalization base for attracting additional financing.[99] These goals have been met. AMSC has become a fully operational enterprise. In addition to the initial $40 million capital contribution made by the eight members, AMSC's stockholders have committed an additional $100 million in equity capital and recently funded $20 million of that amount. [100] Implementation of the MSS system is proceeding in a timely manner.

63. In view of AMSC's progress, we are satisfied that the company, as presently structured, will be able to raise sufficient financing to complete construction of, launch and operate an MSS system. Thus, the financial contributions of the three reinstated applicants are not, at this point, essential for the success of the enterprise. We therefore see no reason to impose a minimum contribution on these entities as a condition of participation. Allowing them to join according to their ability and willingness to invest will allow the broadest participation with no countervailing considerations.

64. The reinstated applicants will not be required to demonstrate their financial eligibility by placing their intended contribution in cash in an escrow account. Rather, each applicant will have 60 days from release of the *Final Order* in this proceeding to provide AMSC with an unconditional letter of credit, performance bond, or cash in the amount it wishes to invest. The procedure by which these instruments will be converted into ownership shares in AMSC is as follows and is similar to the procedure adopted in authorizing the initial eight members of the consortium.[101] First, AMSC will be required either to modify its Stockholder's Agreement or to authorize an additional subscription offer to accommodate these additional contributions. This must be accomplished within 60 days of the date by which the intended contributions must be committed. Once this has been done, the applicants will have 60 days to convert their funds into investment shares. Grant of each of the three reinstated applications will be conditioned upon each party individually providing certification to the Commission that it has completed its stock purchase.[102] If a party does not pro-

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[92] *See* An Inquiry Relating to Preparation for the International Telecommunication Union World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum, Report, FCC 91-188 (released June 20, 1991); Second Notice of Inquiry, 5 FCC Rcd 6046 (1990); Supplemental Notice of Inquiry, 6 FCC Rcd 1914 (1991).

[93] The U.S. allocation scheme for the upper L-band provides that AMSS(R) shall have priority access with real-time preemptive capability in the whole band. *See* 47 C.F.R. § 2.106, footnote US309. For this reason, the Commission recently stated that it was "reluctant" to consider the LEO proposals for WARC-92 that had been filed by Motorola Satellite Corporation and Ellipsat Corporation in the 1646.5-1660.5 MHz band. *See* Supplemental Notice of Inquiry, 6 FCC Rcd at 1917, paras. 22-23.

[94] Because the status that vested for coordination purposes was conferred on a geostationary satellite system, the U.S. would be deemed to have abandoned its previous MSS system.

[95] *See, e.g.,* Telesat Canada Feasibility Study of Spectrum Sharing between LEO/MSS and GSO/MSS and Fixed Services and FPLMTS (Final Report) (April 25, 1991).

[96] MSSI Application (April 30, 1985), Technical Statement and Expansion Plan at n. 1.

[97] 2 FCC Rcd at 488, paras. 20-24.

[98] Slip op., *supra* note 2, at 38-41. The court did not pass on the requirement that a minimum $5 million investment be made. Slip op. at n. 59.

[99] *See* Second Report and Order, 2 FCC Rcd at 488-492, paras. 24 and 48 and n. 38.

[100] *See* AMSC Comments (April 11, 1991) at 6-7.

[101] *See* Memorandum Opinion, Order and Authorization, 4 FCC Rcd at 6044, para. 29.

[102] The Commission does not intend to extend the date for applicants to elect to participate in the consortium.

vide this certification, its authorization to participate in the consortium will expire. AMSC must certify within 10 days after the date on which the stock purchase is made that each of the new members has made an initial investment.

65. Further, as we stated in the *Second Report and Order*, the ownership share of each of the participating members is to be proportional to its contribution.[103] After their initial contributions are made, the new consortium members will be free to make additional capital and non-capital contributions into the consortium, as the consortium may need such contributions, with their ownership shares adjusted to reflect these investments. The new consortium members will also be subject to AMSC's bylaws and other intracorporate agreements, although, of course, these agreements may be amended pursuant to existing corporate procedures.

D. Other Issues

66. A Several other issues were raised by those filing comments regarding how the Commission should proceed in light of the court's decision. While these comments were solicited on an informal basis, and all interested entities will have an opportunity to comment formally on this *Tentative Decision*, we nevertheless briefly discuss here some of the more significant issues that were raised.

1. AMSC's Qualifications

67. In its comments, MSSI questions AMSC's qualifications to hold a Commission license. First, MSSI states that Hughes Aircraft Company (HAC) is not qualified to hold any interest in AMSC because it entered a guilty plea with respect to two counts of unauthorized conveyance of Department of Defense documents. Second, MSSI states that all consortium members did not receive equal ownership shares in the company, in contravention of Commission directives. Last, MSSI states that control of AMSC has shifted without obtaining prior Commission consent. Each of these is without merit and will be discussed in turn.

68. With respect to MSSI's first claim, HAC is the corporate parent of Hughes Communications, Inc. (HCI), which is, in turn, the corporate parent of HCMSS. HCMSS is a minority shareholder of AMSC. HAC is not involved in communications activities. Further, HAC and AMSC have no officers or directors in common;HAC has no control over the day-to-day operations of AMSC. Neither HCMSS nor AMSC is alleged to have engaged in any misconduct. The nexus between HAC's wrongdoing and these entities is so far removed that it is not relevant to either HCMSS's or AMSC's character qualifications. [104]

69. Second, contrary to MSSI's contention, the Commission did not require that each entity receive or maintain an equal ownership share in the consortium. Rather, the Commission stated that the ownership share of each of the participating members was to be proportional to its capital and non-capital contributions, with the value of any non-capital contributions determined by the consortium.[105] MSSI notes that as of February 1991, more than one-and-a-half years after AMSC was licensed, NAMS owned 10.35% of the voting stock of AMSC, while the remaining seven participants each owned 12.81%.[106] Even assuming that this constituted the ownership arrangement immediately after the participants had transferred their initial $5 million into the consortium, this provides no indication that Commission policy was violated. AMSC states while its joint application was pending, NAMS did not assist in prosecuting the license or in moving the business forward and did not share in the financial risks incurred by the others.[107] AMSC's ownership structure appears to reasonably reflect these non-capital contributions. Moreover, AMSC and NAMS mutually agreed as to the percentage of NAMS's ownership in the consortium. For these reasons, MSSI's contention that AMSC violated the Commission's ownership policies is misplaced.

70. Finally, we disagree that AMSC has engaged in an unauthorized transfer of control. MSSI, citing a Dow Jones news release, contends that since AMSC's license was granted, two of the eight participants -- SMTC and Transit -- have relinquished their interests, three -- HCMSS, McCaw, and MCCA -- have assumed *de jure* control by increasing their ownership shares to more than 25% each, and the remaining three together have less than 25% of the AMSC stock. Contrary to MSSI's contentions, these ownership shifts do not constitute a *de jure* or a *de facto* transfer of control.[108] A controlling interest in AMSC has not been transferred. No one entity holds a majority stock interest in AMSC nor does MSSI provide any evidence that the three largest shareholders will vote their shares as a block or that they otherwise have *de facto* control of AMSC. Consequently, prior Commission consent was not required.

71. AMSC is comprised of eight of the eleven entities that filed MSS applications by the cutoff date in 1985. It represents a wide range of companies, from start-up companies to large, experienced industry participants. It has developed and is constructing a state-of-the-art MSS system that has been in the process of coordination for the last several years, that is designed to meet specific Commission and international requirements, and that will provide valuable and needed services to U.S. domestic users. We therefore tentatively grant AMSC a license to construct, launch and operate a domestic MSS system in the

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[103] Second Report and Order, 2 FCC Rcd at 491, para. 45.

[104] *See* Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), *recon.*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990). Considering the violations on the merits, several mitigating factors must be considered. The only individual indicted was a mid-level employee of HAC -- no officers or directors were involved. Further, HAC volunteered the information that resulted in the guilty plea before the beginning of the grand jury investigation and cooperated fully with the investigation. HAC paid its penalties and has implemented corrective procedures to avoid future violations.

[105] *See Second Report and Order*, 2 FCC Rcd at 491, para. 45.

[106] NAMS cites AMSC's Pro Forma Transfer Application (February 27, 1991), at Exhibit VI.

[107] Reply Comments of AMSC (April 23, 1991) at n. 18.

[108] *See, e.g.*, McCaw Cellular Communications, Inc., 4 FCC Rcd 3784, 3788-89 (Com. Car. Bur. 1989); Barnes Enterprises, Inc., 55 FCC 2d 721 (1975); Clay Broadcasters, Inc., 21 R. R. 2d 442 (1971) (prior approval necessary when 50% or more of the stock is transferred).

1545-1559 MHz and 1646.5-1660.5 MHz bands in accordance with the technical parameters described in its Joint Application to construct, launch, and operate an MSS system.[109]

2. Cutoff Issues

72. Two entities that are not parties to this proceeding filed comments urging that the Commission reopen the MSS licensing proceeding and accept new applications. ARINC states that limiting MSS applicants to a group defined six years ago could leave the public with a less efficient MSS system and that it is unfair to permit those applicants whose ownership has changed after the cutoff date to participate without allowing others to participate as well. ARINC concludes that the cutoff for MSS applications in the upper L-band should therefore be reopened. Satellite CD Radio, Inc., which has filed an application for a license to construct and launch a satellite system in the lower L-band frequencies, argues that a new cutoff should include the lower L-band as well as the upper L-band. [110] It states that because AMSC has also applied for a license to operate in the lower L-band and has indicated that this spectrum is needed in addition to the upper L-band spectrum, AMSC and Satellite CD Radio are in a mutually exclusive situation. Satellite CD Radio concludes that the Commission cannot take any action on AMSC's upper L-band application without considering Satellite CD Radio's application.

73. We will not reopen the MSS cutoff. The Commission has regularly employed cutoff procedures to ensure "orderliness, expedition and finality" in the licensing process and these procedures have been upheld by the courts.[111] Moreover, the ARINC court did not suggest that the cutoff for MSS applications in the upper L-band should be opened to new applicants. Rather, the court limited the scope of its order to separate issues raised by ARINC and to reinstate only those three applications that had previously been dismissed. Further, the lower L-band is not relevant to this proceeding. Any allocation and licensing decisions involving the lower L-band will be made independently of this proceeding and all parties will be afforded a full opportunity to comment at that time. Finally, reopening the MSS cutoff to any number of new applications, with its accompanying delay, would prevent an expeditious resolution of the MSS licensing question. For the reasons previously discussed, any significant delay in proceeding with international coordination of a domestic MSS system in the upper L-band may effectively preclude implementation of a domestic system in that band.

3. Omninet Application

74. Omninet Corporation was one of the twelve applicants that filed by the March 29, 1985 cutoff date. However, it withdrew its application on June 15, 1987.[112] Omninet has now filed a request for reinstatement of its application, stating that it had withdrawn its application in response to the Commission's requirements that it participate in a consortium and that it place $5 million in an escrow account. Omninet states that the court's decision and the public interest require that it be granted permission to resubmit its application for consideration with the other applications filed by the cutoff date.

75. We will not grant Omninet's request. Omninet voluntarily withdrew its application, removing itself from this proceeding. [113] Indeed, Omninet did not even appeal the Commission's financial requirement or otherwise contest the rules and policies established for MSS in the *Second Report and Order*. Thus, it has no more right to enter the proceeding at this time than any other entity that is not currently a party. Omninet's application will not be reinstated.

4. Motorola Request for Rulemaking

76. Two months after the ARINC court's decision, Motorola Satellite Communications, Inc. (Motorola) filed a Petition for Further Rulemaking. Motorola contends that in light of the court's remand and the six-year old record in this proceeding, the Commission should reexamine usable MSS spectrum and state-of-the-art technologies, and develop new policies and procedures for licensing MSS systems. Motorola asserts that its interest in this proceeding is predicated on its application to construct a LEO satellite system in the 1610-1626.5 MHZ band and its desire to locate sufficient additional spectrum to meet anticipated demand for its service.

77. Motorola's petition is dismissed. The Commission's allocation decisions involving the upper L-band were upheld by the court and we see no reason to reopen these issues or to institute a new cutofff or MSS applications.[114] Implementation and coordination of AMSC's system is proceeding and the U.S. should soon have the benefit of

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[109] Several entities commenting in response to the Commission's Public Notice have argued that AMSC is no longer an applicant and should not be treated as such. These arguments are moot in light of this Tentative Decision.

[110] The lower L-band is the 1530-1545/1626.5-1645.5 MHz band.

[111] *See, e.g.*, Radio Athens, Inc. (WATH) v. FCC, 401 F.2d 398, 400-401 (D.C. Cir. 1968); Green Country Mobilephone, Inc., 98 FCC 2d 593, 600 (1984); John W. Talbott, 60 FCC 2d 511, 513 (1976).

[112] *See* letter from Counsel, Omninet Corporation to Secretary, FCC (June 15, 1987).

[113] In its letter withdrawing its application, Omninet states only that its applications were "being withdrawn as a matter of right" pursuant to the Commission's rules. *Id.*

[114] Motorola argues that Commission cannot continue to process AMSC's application without inviting others because the AMSC system is significantly changed from the one authorized. Motorola cites the Commission's recent dismissal of Geostar Positioning Corporation's (Geostar's) request to modify its radio determination satellite service (RDSS) system. In that decision, Geostar's proposed modifications were found to be so significant as to be tantamount to an application for a new system and, accordingly, the application was required to be considered in a new RDSS processing group. Geostar Positioning Corporation, DA 91-528 (Com. Car. Bur. April 30, 1991). Motorola's argument is misplaced. The Commission regularly entertains requests for technical changes to satellites after a license has been granted. *See, e.g.*, GE American Communications, Inc., 3 FCC Rcd 6871 (1988) (application to increase power was treated as a modification even though the higher-power satellite could not be coordinated with adjacent satellites); Hughes Communications Galaxy, Inc., DA 90-780 (Com. Car. Bur. June 6, 1990) (application to consolidate two single-band satellites into a hybrid satellite was treated as a modification). Geostar's modification was dismissed because it was not consistent with the Commission's RDSS rules and policies. Geostar Positioning Corp., *supra*, at paras. 12-17. In contrast, AMSC's technical modifications were fully in conformance with MSS policies. In

AMSC's state-of-the-art service. Moreover, for the reasons discussed above, it is of paramount importance that the U.S. proceed promptly withcoordination of AMSC's upper L-band system. The Commission is considering LEO proposals in other frequency bands domestically[115] and the United States is attempting to procure frequencies internationally for these systems at the upcoming WARC.[116] All LEO applications properly filed will be duly considered in the course of these proceedings.

E. Temporary Authorization

78. In order to ensure that the United States can continue to participate effectively in the international coordination process in the immediate future, we hereby grant AMSC temporary authority to continue as the U.S. MSS system described in its Joint Amendment pending the adoption of a *Final Decision* in this proceeding. This decision fully comports with the standard of extraordinary circumstances set forth in section 309(f) of the Act for temporary operations, as well as the standard for interim operation set forth in *La Star Cellular*.[117] In that case, the court stated that when determining whether to issue a grant of interim authority pending comparative proceedings, the Commission must "balance the public interest in the immediate issuance of a license against the potential harm to the fair consideration of competing applicants."[118] As discussed below, even assuming the Commission ultimately decides to conduct comparative hearings, the public interest in securing sufficient spectrum for a domestic MSS system by proceeding with the planned coordination meetings outweighs any possible prejudice that might result to the three reinstated applicants during a brief period of temporary authority.

79. There are extraordinary circumstances that warrant a grant of temporary authority in this case. As noted, the United States has scheduled significant coordination meetings over the next several months, including meetings with Canada in August 1991 and INMARSAT in September 1991. A multilateral meeting with Canada, INMARSAT, the USSR and Mexico is being planned for as early as November 1991. Given the progress that has been made during previous bilateral meetings, the forthcoming discussions will focus on specific operational matters and compromises.[119] If we do not participate at these meetings, along with a domestic licensee, the United States will be placed at a significant disadvantage.[120] Further, it would not serve the United States' interests to delay these meetings until a *Final Decision* in this proceeding is reached. The meetings have been extremely difficult to schedule and a United States effort to postpone them would seriously undermine our international credibility and negotiating position. In addition, because four parties are involved, each full round of discussions among all the parties requires six separate bilateral meetings. Given the number of meetings that are required and that are currently scheduled, it will be difficult to reschedule a series of cancelled meetings in a timely fashion. Moreover, even if the United States does not participate at these meetings, other entities will still proceed with the coordination of their systems during this time.

80. Further, a temporary grant is consistent with our tentative decision to proceed with a mandatory consortium, which obviates the need for a comparison of the individual applicants.[121] Even if the reinstated applicants, commenting in response to this *Tentative Decision*, can demonstrate that comparative hearings are in the public interest, any prejudice to them will be minimal, as we intend to issue a *Final Decision* on an expedited basis. Moreover, by statute, a grant of temporary authority is limited to 180 days and we fully expect to complete these proceedings within that time frame. Thus, we conclude that the public interest would be best served by granting AMSC temporary authority to continue as the U.S. authorized MSS system for 180 days pending the issuance of a *Final Decision*.

III. CONCLUSION

81. By this *Tentative Decision*, we have sought to resolve the licensing issues that have been remanded to us in a manner that will best ensure the implementation of a U.S. domestic MSS system in the upper L-band. We have fully considered the alternative of holding comparative hearings, but have concluded that the exigencies of the international coordination process require that we proceed immediately with a domestic licensee. If any other course is pursued, the United States will likely be unable to secure enough spectrum in the upper L-band to support a viable domestic system.

82. Pursuant to the procedures set out in Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, interested parties may file comments on this *Tentative Decision* on or before September 4, 1991 and reply comments on or before September 23, 1991. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments,

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fact, the Commission *required* AMSC to amend its application in order to conform with the sharing requirements and feeder link frequencies that had been, and were continuing to be, developed for MSS service in the upper L-band. *See* Memorandum Opinion, Order and Authorization, 4 FCC Rcd at 6059, at para. 133.

[115] Two proceedings are currently being conducted involving LEO systems. The first involves LEO satellites that would operate in the 137-138/148-149.9 MHz band and the second -- which includes Motorola's application and several competing applications -- involves LEO satellites that would operate in the 1610-1626.5/2483.5-2500 MHz band.

[116] *See* para. 59, *supra*.

[117] 899 F. 2d at 1233.

[118] *Id.* at 1235.

[119] *See* paras. 47 and 49, *supra*. It would be neither feasible nor productive to attend these meetings with a temporary licensee other than AMSC. The negotiations leading up to these particular meetings have been based on AMSC's planned system and, at this stage, it would be far too late to begin discussions of possible alternative systems.

[120] *See* paras. 42 and 49-50, *supra*, for a more detailed discussion of the importance of participating in negotiations with a licensee.

[121] Obviously, no prejudice to future comparative proceedings would occur if we ultimately decided to authorize an MSS licensee by lottery.

provided that such information is placed in the public file, and provided that the fact of the Commission's reliance is noted in the *Final Decision* to follow.

83. In accordance with the provisions of Section 1.419 of the Commission's rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and ten copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Comments and reply comments should be sent to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. All documents will be available for public inspection during regular business hours at the Domestic Facilities Division Public Reference Room, Room 6220, 2025 M Street, N.W., Washington, D.C. For general information on how to file comments, please contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

84. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a tentative decision until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of the presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* 47 C.F.R. § 1.1231.[122]

IV. ORDERING CLAUSES

85. Accordingly, pursuant to Sections 4(i), 4(j), 214(c), 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 4(j), 214(c), 303(r) and 309, we hereby give notice that the policies set forth in this document are adopted as a Tentative Decision.

86. IT IS FURTHER ORDERED that American Mobile Satellite Corporation IS GRANTED temporary authority to construct the system described in its Joint Amendment (filed February 1, 1988), as amended, and as further modified by the terms and conditions of *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 6041 (1989), for 180 days, pending the adoption of a Final Decision in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[122] Any communications regarding specific pending applications or the grant of temporary authority authorized herein are subject to the *ex parte* rules for restricted proceedings. *See* 47 C.F.R. § 1.1208.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-67

In the Matter of

Amendment of Section 73.202(b),	RM-7026
Table of Allotments,	RM-7057
FM Broadcast Stations.	
(Bon Air, Chester, Mechanicsville,	
Ruckersville, and Williamsburg,	
Virginia)	

FIRST REPORT AND ORDER

Adopted: August 8, 1991; Released: August 19, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 1124 (1990) ("*Notice*"), issued in response to petitions filed by Sinclair TeleCable, Inc. ("Sinclair"), licensee of Station WCDX(FM), Channel 224A, Mechanicsville, Virginia, and Keymarket of Virginia ("Keymarket"), licensee of Station WQSF(FM), Channel 243B, Williamsburg, Virginia. In the *Notice*, we proposed the substitution of Channel 221B1 for Channel 224A at Mechanicsville, the change of community of license for Station WCDX(FM) from Mechanicsville to Bon Air, Virginia, and simultaneously proposed to change community of license for Channel 243B at Williamsburg to Mechanicsville or Fort Lee, Virginia, and modify each station's license accordingly, consolidating the petitions at the petitioners' request. In the alternative, Sinclair requested an upgrade on Channel 221B1 at Mechanicsville, if it could not obtain the change of community to Bon Air. An *Order to Show Cause* was issued to Ridge Broadcasting Corp. ("Ridge"), licensee of Station WXZY(FM), at Ruckersville, Virginia, Channel 221A, directing the licensee to demonstrate why its license should not be modified to specify operation on Channel 270A in lieu of Channel 221A. The other channel substitution necessary to Sinclair's upgrade, Channel 226A for 221A at Chester, Virginia, was agreed upon by Hoffman Communications, Inc. ("Hoffman"), the licensee of affected Station WDYL(FM), Chester, Virginia, and therefore no order to show cause was issued for the Chester station. Sinclair and Keymarket each filed supporting comments in response to the *Notice*. Sinclair's comments reiterated its interest in an upgrade at Mechanicsville as an alternative proposal, and also proposed related channel allotments at Burkeville and Grottoes, Virginia. Sinclair also stated its intention to reimburse Hoffman for its related expenses in changing its frequency and transmitter site. However, recognizing that Ridge was the permittee of an unbuilt station with a modification application pending at the time the petition for rule making was filed in this proceeding, Sinclair questions whether any reimbursement should be permitted for expenses incurred after the filing date. Snow Hill Community Broadcasting filed supporting comments and a petition for rulemaking for a new allotment of Channel 243A at Snow Hill Maryland, contingent on grant of the change of community of license of Channel 243B from Williamsburg to Mechanicsville.[1] Also in response to the *Notice*, Richard J. Hayes and Associates, Inc. filed a counterproposal for a new channel allotment at Ettrick, Virginia, which was later withdrawn.

2. On February 13, 1991, Sinclair withdrew its proposals to change Station WCDX(FM)'s community of license from Mechanicsville to Bon Air, and to allot new FM channels at Burkeville and Grottoes, Virginia. Sinclair requested that the Commission dismiss these proposals and go forward only with Station WCDX's upgrade from Channel 224A to Channel 221B1 at Mechanicsville. Additionally, in a Motion to Sever, Sinclair requested that the Commission sever its upgrade proposal for Station WCDX(FM) at Mechanicsville from Keymarket's proposal to change Station WQSF(FM)'s community of license. ABS Richmond Partners, L. P. ("ABS"), licensee of Station WKHK(FM), Colonial Heights, Virginia, filed comments in opposition to this proposal, and Sinclair filed a reply.[2] For the reasons discussed below, we will grant Sinclair's request to go forward with its alternative request for an upgrade at Mechanicsville, and withdraw its Bon Air, Burkeville, and Grottoes proposals. Because there is no technical conflict between the Sinclair and Keymarket proposals, we will grant Sinclair's motion to sever.

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[1] Filing comments in opposition to the *Notice* were Ridge Broadcasting Corporation, Capitol Broadcasting Company of Virginia, Edens Broadcasting, Inc., Roy H. Park Broadcasting of Virginia, High Communications Partnership, Summit-Atlanta Broadcasting Corporation, and ABS Richmond Partners. With the exception of Park, who objected only to the proposed move of Station WQSF to Mechanicsville, and Ridge and High, who focus primarily on the modification of the Ruckersville station required by Sinclair's proposal, the commenters opposed both community changes proposed in the *Notice*, *i.e.*, the Keymarket move to Mechanicsville, and Sinclair's proposed move to Bon Air. Ridge's comments are addressed below. The issues raised in the balance of these comments will be addressed in context at the time the Williamsburg change of community petition is ripe for discussion.

[2] Sinclair challenges the validity of ABS' pleading raising substantive matters because that pleading was filed outside the comment and reply comment cycle set in this proceeding, citing for example, *Dunn, North Carolina*, 4 FCC Rcd 2301 note 1 (1989); *Rockport, Texas, et al.*, 4 FCC Rcd 8075, note 3 (1989); *Raymondville, Texas, et al.*, 4 FCC Rcd 8078, note 5 (1989). Sinclair also argues that the late-filed pleading should not be accepted because it did not have an accompanying request for leave to file, and cites to *Springdale, Arkansas , et al.*, 4 FCC Rcd 674, Note 8 (1989); *Chippewa Falls, Wisconsin et al.*, 3 FCC Rcd 5553, note 4; (1988) *Millbrook, Alabama*, 3 FCC Rcd 3646 note 1 (1988). Sinclair states that its own pleading, filed merely to simplify a matter which had become more complicated than it had anticipated, deliberately avoided addressing the merits of the proposal. Because the substantive matters raised in ABS' pleading are similar to those raised by affected permittee Ridge, and are relevant to the issues raised by the Motion to Sever, we will address them in conjunction with Ridge's timely filed comments.

3. Ridge's response to the *Order to Show Cause* opposed the *Notice*, and ABS' comments opposed the proposed upgrade at Mechanicsville. ABS states that Sinclair's attempt to seek its upgrade to Channel 221B1 at Mechanicsville is a new proposal. ABS states that Sinclair's only previous reference to this alternate proposal was the concluding sentence of the petition for rule making, and the *Notice* did not contain information with respect to this alternate proposal. Furthermore, according to ABS, the proposal is invalid because three different sets of coordinates have been proposed and it is unclear which set of coordinates should be used in considering the current proposal. Both Ridge and ABS state that the proposed channel substitution (Channel 270A for Channel 221A) for Station WXZY(FM), Ruckersville, Virginia, is not the equivalent of its present channel because there is no prospect of Ridge's increasing power to 6 kW, maximum Class A facilities, on the substituted channel.[3] Both commenters also challenge the long-standing policy which delays the processing of pending applications which conflict with rule making proposals, and Ridge states that its construction permit modification application (File No. BMPH-890509IE) for a change of transmitter site should be preferred because it was filed prior to the petition for rule making and because it entails improvement to a new service to the community of Ruckersville.

4. After consideration of the pleadings relevant to the severed portion of this proceeding, we believe that the public interest would be served by substituting Channel 221B1 for Channel 224A at Mechanicsville, Virginia, and modifying the license for Station WCDX(FM), Mechanicsville, Virginia to specify the higher class channel because this will result in an expanded area FM service for Mechanicsville.[4] To accommodate this upgrade, we will substitute Channel 226A for Channel 221A at Chester, Virginia, and modify the license for Station WDYL to specify operation on the alternate channel. Likewise, we will substitute Channel 270A for Channel 221A at Ruckersville, Virginia. As explained below, we believe Ridge has not shown sufficient cause why its presently authorized Channel 221A at Ruckersville should not be replaced with Channel 270A.

5. As a threshold matter, the Mechanicsville proposal is not a new proposal. The petition for rule making explicitly set forth the Mechanicsville proposal on pages 6 and 12; the petition specifically addressed the public interest benefits to the upgrade at either Bon Air or Mechanicsville; and the *Notice* made specific note of the alternative proposal. *See Notice* 5 FCC Rcd 1124 note 1. Additionally, a separate set of coordinates for Channel 221B1 at Mechanicsville (37-42-50 and 77-30-23) at a site 17 kilometers northwest was accepted by the Commission and entered into the Commission's data base.[5] Last, the parties received notice of the alternate proposal to Mechanicsville. Both Ridge and ABS, among other parties, acknowledged the alternate proposal in their comments, and Ridge's and ABS' comments even appear to endorse the alternate proposal in lieu of the Bon Air proposal. Therefore, the September 7, 1989 filing date of the original proposal is applicable, and the requests to substitute channels at Chester and Ruckersville are valid and comply with the spacing rules in effect at the time of filing.

6. In this connection, Ridge and ABS are incorrect in their claim that the channel substitution proposed for Station WXZY is not an equivalent channel. Because Sinclair filed its proposal before October 2, 1989, when the rules applicable to Class A maximum power went into effect, 3 kW, not 6 kW, is the maximum power to which Ridge is entitled. *See Second Report and Order* in MM Docket 88-375, *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989). We consider channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Vero Beach, Florida*, 3 FCC Rcd 1049 (1988) *rev. denied*, 4 FCC Rcd 2184, 2185 (1989). No such showings were made in this proceeding. Furthermore, although Channel 270A will present greater obstacles to a power increase than Channel 221A, there was no certainty that Station WXZY could increase to 6kW at 221A due to short spacing to Station WUVA. Additionally, based on population gain in the 1 mV/m contour of each station, an upgrade to Class B1 at Mechanicsville, with a gain area that would, according to Sinclair, include 81,148 persons, would have priority over a WXZY power increase to 6 kW, which would, according to Ridge, increase service to 16,000 persons. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 90-93 (1982).

7. With respect to Ridge's argument that its application to relocate to a new transmitter site should have been preferred over the petition for rule making, we conclude that the application represents a mere site preference, and therefore does not present sufficient public interest benefit to warrant preference over the benefits that could be realized from Sinclair's proposal. *See Angola, et al., Indiana; Brooklyn, et al., Michigan*, 6 FCC Rcd 1230, 1231 (1991); *Cookeville, et al., Tennessee*, 5 FCC Rcd 677, 678 (1990); *Andalusia, Alabama*, 49 FR 32201 (1984). Further, this application was granted with a condition that it would be subject to the outcome of this proceeding. That condition explicitly informed Ridge that any construction it undertook would be at its own risk. Therefore, Ridge knew that it could be required to change channels at a later date without reimbursement.[6] Under these circumstances, no reimbursement will be ordered to Ridge.[7]

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[3] ABS suggests that Stations WDYL and WXZY could both increase power to 6 kW at their current locations, which would be precluded by the Mechanicsville upgrade. ABS further suggests that these two stations, in conjunction with Station WCDX, could form a three station 6 kW "parlay" with major population gains in three different service areas, while avoiding frequency and transmitter site displacements. Proposals in support of these suggestions are not before us, and we therefore need not address them.

[4] We note that ABS has not made any showing that Sinclair's request herein exhibits any lack of credibility, and we will not address this allegation.

[5] These coordinates, as well as the coordinates supplied by Sinclair for its proposal at Bon Air, are compatible with the upgrade at Mechanicsville.

[6] We note that in Ridge's comments, it makes no assertion that it is entitled to reimbursement.

[7] By way of contrast, Chester was an existing station at the

8. An engineering analysis reveals that Channel 221B1 can be allotted to Mechanicsville at a restricted site 17 kilometers northwest.[8] Channel 226A can be allotted to Chester, Virginia, at a restricted site 2.4 kilometers northeast.[9] Channel 270A may be allotted to Ruckersville at Station WXZY's present transmitter site.[10]

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Mechanicsville, Virginia	221B1
Chester, Virginia	226A
Ruckersville, Virginia	270A

10. IT IS FURTHER ORDERED, That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Sinclair TeleCable, Inc. for Station WCDX(FM), Channel 224A, Mechanicsville, Virginia, IS AMENDED to specify operation on Channel 221B1 subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Ridge Broadcasting Corp. for Station WXZY(FM), Channel 221A, Ruckersville, Virginia, and the license of Hoffman Communications, Inc. for Station WDYL(FM), Channel 221A, Chester, Virginia, ARE MODIFIED to specify operation on Channels 270A and 226A, respectively, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WXZY(FM) and Station WDYL(FM)'s authorizations, except the channels as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with the stations' authorizations except for the channels as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *First Report and Order,* to the following:

Ridge Broadcasting Corporation
P.O. Box 7932
Charlottesville VA 22906
(Licensee of Station WXZY(FM))

Hoffman Communications, Inc
10600 Jefferson Davis Hwy.
Richmond, VA 23237
(Licensee of WDYL(FM))

13. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

time Sinclair's petition was filed and is, therefore, entitled to reimbursement for the reasonable costs involved in the channel change and transmitter site change to which they have consented.

[8] Coordinates for Channel 221B1 at Mechanicsville are 37-42-50 and 77-30-23.

[9] The coordinates for Channel 226A at Chester are 37-22-16 and 77-25-41. Since this allotment is the result of a petition for rule making filed prior to October 2, 1989, the licensee at Chester may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WFOG, Channel 225B, Suffolk, Virginia, and Station WFLS-FM, Channel 227B, Fredericksburg, Virginia.

[10] Coordinates for Channel 270A at Ruckersville are 38-14-55 and 78-24-38. Since this allotment is the result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c) with respect to the construction permit and licensed sites for Station WRXL, Channel 271B, Richmond, Virginia.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-550

In the Matter of

Amendment of Section 73.202(b),	RM-6983
Table of Allotments,	RM-7274
FM Broadcast Stations	
(Knob Noster and Moberly[1]	
Missouri)	

REPORT AND ORDER

Adopted: August 8, 1991; Released: August 19, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* in this proceeding, 4 FCC Rcd 8459 (1989) ("NPRM"), which was issued in response to a Petition For Rule Making filed by Bick Broadcasting Company ("Bick"), licensee of station KXKX(FM), Channel 288A, Knob Noster, Missouri. The *NPRM* proposed that Channel 289C3 be substituted for Channel 288A at Knob Noster and that Bick's license be modified to specify operation on the upgraded channel. To accomodate this proposal, the NPRM also proposed to substitute Channel 290A for vacant and unapplied for Channel 289A at Wheeling, Missouri. In response to the *NPRM*, Bick filed comments. FM 105, Inc., licensee of Station KZZT(FM), Channel 288A, Moberly, Missouri, filed comments and a counterproposal requesting the substitution of Channel 288C3 for Channel 288A at Moberly and modification of its license to specify the higher powered channel.[2] Bick filed reply comments.

2. In its comments, Bick states that its proposal is in the public interest as it provides the first wide area coverage station to the Knob Noster and Johnson County, Missouri area. Bick also reaffirms its interest in applying promptly for Channel 289C3 if it is allotted to Knob Noster and in promptly constructing and operating a facility if its application is granted. FM 105, in its comments, requests that the Commission consider its directly related but nonconflicting proposal to substitute Channel 288C3 for Channel 288A at Moberly and to modify its license to specify operation on the upgraded channel. FM 105 indicates that the upgrade it requests is made technically possible by the change of Bick's channel of operation from 288A to 289C3.

3. In its reply comments, Bick supports the request of FM 105 for the allotment substituting 288C3 for Channel 288A at Moberly. However, Bick states that FM 105's and Bick's upgrades are unrelated and therefore requests that FM 105's upgrade be processed as a separate, independent rule making in order to prevent "un-needed delay" in the Commission's processing of Bick's own upgrade request.

4. We believe that the public interest would be served by substituting Channel 289C3 for Channel 288A at Knob Noster because it would provide wide area coverage facilities to Knob Noster. To accommodate this upgrade, we will substitute Channel 290A for vacant and unapplied for Channel 289A at Wheeling, Missouri. The Knob Noster upgrade will also enable FM 105 to upgrade Station KZZT(FM), Channel 288A, Moberly, Missouri, by substituting Channel 288C3, which will serve the public interest by providing a wide area FM service to that community. Since there is no opposition to the Moberly request, consolidation of that upgrade has not caused us to delay action on the Knob Noster upgrade.

5. As indicated in the *Notice*, Channel 289C3 can be allotted to Knob Noster in compliance with the minimum distance seperation requirements at the petitioner's specified site. [3] Channel 290A can be alloted to Wheeling consistent with the mileage separation requirements at the city reference site.[4] Likewise, Channel 288C3 can be allotted to Moberly at the petitioner's specified site. [5]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended and Sections 0.61, 0.204(b), 0.283 of the Commissions Rules, IT IS ORDERED, That effective **October 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Knob Noster, Missouri	289C3
Wheeling, Missouri	290A
Moberly, Missouri	284C, 288C3

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Bick Broadcasting Company for Station KXKX-FM, Channel 288A, Knob Noster, Missouri, IS MODIFIED to specify operation on Channel 289C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

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[1] The community of Moberly, Missouri, has been added to the caption.

[2] Public Notice of the counterproposal was given February 6, 1990, Report No. 1807.

[3] The coordinates for Channel 289C3 at Knob Noster are 38-46-28 and 93-37-34.

[4] The coordinates for Channel 290A at Wheeling, Missouri, are 39-47-12 and 93-23-07. Since the petition resulting in this allotment was filed prior to October 2, 1989, applicants for this allotment may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station KLZR(FM), Channel 290C1, Lawrence, Kansas.

[5] The coordinates for Channel 288C3 at Moberly are 39-24-54 and 92-24-36.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of FM 105, Inc., for Station KZZT-FM, Channel 288A, Moberly, Missouri, IS MODIFIED to specify operation on Channel 288C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding is terminated.

10. For further information concerning this proceeding, contact Belford V. Lawson, III, Mass Media Bureau (202)634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-645

In the Matter of

Amendment of Section 73.202(b), RM-7556
Table of Allotments,
FM Broadcast Stations.
(Jesup and Midway, Georgia)

ERRATUM

Released: August 19, 1991

By the Chief, Allocations Branch:

On April 23, 1991, the Commission's Mass Media Bureau released a *Report and Order* (DA 91-490) in the captioned proceeding. This document corrects paragraph 5(b) which states the FCC Form to be filed in conjunction with the action. The correct form to be filed is FCC Form 302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-238

In the Matter of

Amendment of Section 73.202(b), RM-7691
Table of Allotments,
FM Broadcast Stations.
(Colfax, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 8, 1991; Released: August 19, 1991

Comment Date: October 10, 1991
Reply Comment Date: October 25, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dakota Communications ("petitioner"), permittee of Station KRAQ, Channel 272A, Colfax, Washington, proposing the substitution of Channel 273C3 for Channel 272A at Colfax and the modification of its construction permit for Station KRAQ to operate on the higher powered channel.[1] Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 273C3 for Channel 272A at Colfax, Washington, since it would provide the community with a wide coverage area FM service. Channel 273C3 can be allotted to Colfax in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site without the imposition of a site restriction.[2] As requested, we also propose to modify petitioner's construction permit for Station KRAQ to specify operation on Channel 273C3 at Colfax. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 273C3 at Colfax or require the petitioner to demonstrate the availability of an additional equivalent class channel. Since Colfax is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Colfax, Washington	272A	273C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 10, 1991,** and reply comments on or before **October 25, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Dominic Monahan, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W., Suite 500
Washington, D.C. 20037
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

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[1] This petition was originally filed as a counterproposal in MM Docket No. 89-130. Based on the actions taken in that proceeding, we will propose the substitution of Channel 273C3 for Channel 272A at Colfax and the modification of its construction permit for Station KRAQ accordingly.

[2] The coordinates for Channel 273C3 at Colfax are North Latitude 46-51-43 and West Longitude 117-10-26. This site is short-spaced to an application (BPH-890206MB) filed by Davenport Radio Partnership for Channel 273A, Davenport, Washington. However, we note that the applicant has been ordered to amend its application to specify operation on Channel 247A in lieu of Channel 273A. *See Report and Order* (MM Docket No. 89-130), 6 FCC Rcd _____ (released June 13, 1991).

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-239

In the Matter of

Amendment of Section 73.202(b), RM-7769
Table of Allotments,
FM Broadcast Stations.
(Antigo, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 8, 1991; Released: August 19, 1991

Comment Date: October 10, 1991
Reply Comment Date: October 25, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Nicolet Broadcasting, Inc. ("petitioner"), requesting the allotment of Channel 242C3 to Antigo, Wisconsin, as that community's second local FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe petitioner's proposal to provide Antigo with a second local FM service warrants consideration. However, to avoid a short spacing with Station WEZR, Channel 242A, Brillion, Wisconsin,[1] we shall propose the allotment of Channel 291C3 to Antigo. Channel 291C3 can be allotted to Antigo, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[2] Since Antigo is located within 320 kilometers (200 miles) of the U.S-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the fact that the proposed allotment would provide a second local FM service to Antigo, the Commission believes it is in the best interest of the public to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
Community	Present	Proposed
Antigo, Wisconsin	287C1	287C1, 291C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 10, 1991,** and reply comments on or before **October 25, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Roger L. Utnehmer
Nicolet Broadcasting, Inc.
Box 309
2477 Highway 45 North
Eagle River, Wisconsin 54521

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] The construction permit for Station WEZR, Brillion, was amended to specify operation on Channel 298A in lieu of Channel 242A, effective July 1, 1991. *See* 6 FCC Rcd 2624 (1991). A *Notice of Proposed Rule Making* was adopted on July 8, 1991, proposing the substitution of Channel 298C3 for Channel 298A at Brillion and modification of its construction permit accordingly.

[2] The coordinates for Channel 291C3 are 45-08-54 and 89-09-00.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-240

In the Matter of

Amendment of Section 73.202(b), RM-7770
Table of Allotments,
FM Broadcast Stations.
(Peshtigo, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 8, 1991; Released: August 19, 1991

Comment Date: October 10, 1991
Reply Comment Date: October 25, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the petition for rule making filed by Good Neighbor Broadcasting, Inc. ("petitioner"), permittee of Station WHYB-FM, Peshtigo, Wisconsin. Petitioner requests the substitution of Channel 242C2 for Channel 241A at Peshtigo and modification of its construction permit to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. In support of its request, petitioner indicates that in January, 1990, it filed an application for a power increase to six kilowatts and for modification of its transmitter site (BPH-900130IE). However, petitioner states that its new site is now short spaced to a recent channel allotment for Station WJPW(FM), DePere, Wisconsin, in MM Docket 89-282. *See* 6 FCC Rcd 2624 (1991). According to petitioner, its application site is the only site available for Channel 241A that will meet FCC and FAA requirements. Petitioner further states that the substitution of Channel 242C2 for Channel 241A will remove the short spacing with DePere and provide greater service to Peshtigo than previously contemplated on its original frequency.

3. We believe petitioner's proposal warrants consideration because the proposed substitution would provide a wide coverage area station to Peshtigo, Wisconsin. Channel 242C2 can be allotted to Peshtigo, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] The grant of a license for Station WHYB-FM at Peshtigo may be withheld until Station WEZR, Channel 242A, Brillion, Wisconsin, is licensed on Channel 298A and Station WOMA, Algoma, Wisconsin, Channel 243A, is licensed on Channel 244C3.[2] Since Peshtigo, Wisconsin, is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment. We shall also propose to modify petitioner's construction permit for Station WHYB-FM to specify operation on Channel 242C2 in lieu of Channel 241A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Peshtigo or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
Community	Present	Proposed
Peshtigo, Wisconsin	2421A	242C2

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, Return Receipt Requested, a copy of this *Order* to the following:

Brillion Radio Company
Radio Station WEZR(FM)
1296 Marian Lane
Green Bay, Wisconsin 54304
(Permittee at Brillion)

Wheeler Broadcasting, Inc.
Station WOMA
1500 Miller Street
Algoma, Wisconsin 54201
(Licensee at Algoma)

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **October 10, 1991,** and reply comments on or before **October 25, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel as follows:

Denise B. Moline
McCabe & Allen
9105 Owens Drive, Suite D
P.O. Box 2126
Manassas Park, Virginia 22111

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM

[1] The coordinates for Channel 242C2 at Peshtigo are 45-07-19 and 87-51-07.

[2] A *Report and Order* was adopted in MM Docket 89-282, 6 FCC Rcd 2624 (1991), effective July 1, 1991, which modified the licenses for Station WEZR, Brillion and Station WOMA, Algoma, to operate on Channel 298A and Channel 244C3, respectively.

Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-34

In the Matter of

Amendment of Part 90 of the Commission's Rules to Permit the Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees

REPORT AND ORDER

Adopted: July 19, 1991; Released: August 15, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it a *Notice of Proposed Rule Making* and a *Further Notice of Proposed Rule Making* issued in response to a Petition filed by the American SMR Network Association, Inc. (ASNA).[1] In the *Notice*,[2] we proposed to amend our rules to eliminate the need for short-spaced applicants in the SMR Category to procure a waiver of 47 C.F.R. § 90.621(b) [3] if the consent of all constructed and fully operational co-channel licensees has been obtained.[4] In the *Further Notice of Proposed Rule Making*, we expanded the scope of our proposal and solicited commenters' views on a plan also to dispense with the need for a waiver of Section 90.621(b) for those short-spaced applications based on a technical showing of non-interference rather than on a consensual short-spacing agreement.[5]

2. In this *Report and Order*, we take final action to implement the consensual short-spacing proposal set forth in the *Notice*. In addition, we adopt new rules that will be used to permit technical short-spacing on a non-waiver basis.[6] Specifically, we have developed a table based on the power and antenna height of proposed and existing stations and a non-overlap of the 40/22 dBu service and interference contours. The table reflects the permissible proximity between the stations of applicants and existing co-channel licensees whose systems will be separated by less than 70 miles. Applicants whose proposed systems comply with the terms of the table will not be required to secure a waiver. Applicants preferring to proceed under the traditional 40/30 dBu standard may still attempt to do so, but only on a waiver basis.

3. The action taken herein will further the public interest in several significant respects. First, the codification of our consensual short-spacing procedures will make arrangements of this type more accessible to applicants, which in turn will encourage more efficient use of the radio spectrum and enhance competition in the SMR marketplace. The procedures adopted in this proceeding applicable to technical short-spacing will also promote these goals while at the same time responding to the demands of existing SMR licensees for rule changes necessary to protect the integrity of their operations and to safeguard their quality of service.

II. BACKGROUND

4. As discussed in the *Further Notice*, the mileage separation standards at issue in this proceeding are based on the separation typically needed between co-channel SMR stations to provide a reasonable degree of protection against interference.[7] The mileage separation standards were derived in 1974 after the Commission reallocated 115 MHz of spectrum in the 806-947 MHz band for land mobile use.[8] At that time, the Commission undertook a detailed analysis of numerous factors, including certain propagation characteristics and the maximum antenna height and power capacity authorized for land mobile systems, in an attempt to develop technical rules that would maximize efficient operation of land mobile stations licensed on these frequencies.[9] On the basis of these studies, the Commission concluded that on the average, two co-channel SMR systems will operate effectively if the 30 dBu interference contour of one station is not permitted to overlap the 40 dBu service contour of the other.[10] The Commission further ascertained that the 40/30 dBu standard can ordinarily be satisfied if two maximum facility co-channel stations are separated by at least 70 miles.[11] The use of mileage separation standards as a convenient method for expressing the 40/30 dBu interference ratio has remained the primary criterion for the assignment of SMR stations.[12] Although neither the 70-mile separation standard nor the 40/30 dBu analysis on which that standard is based guarantees a particular grade of service or complete avoidance of interference, on the average, the 70-mile standard has yielded high service quality for 800/900 MHz systems.

5. Our experience has shown that it is generally acceptable to permit applicants to depart from the codified mileage separation standards via waiver if (1) the applicant has obtained the consent of all constructed and operational co-channel licensees within the applicable area or (2) the applicant can submit a technical showing demonstrating that, because of the geographical terrain of the area or the design of the system in question, the requested arrangement will allow existing stations protection equal to the 40/30 dBu ratio. We have considered the licensing of short-spaced applicants able to make either of these showings beneficial because it maximizes spectrum efficiency and the provision of service to the public without impairing the operations of existing co-channel licensees.[13]

6. In January of 1989, ASNA submitted its petition suggesting that we incorporate into a rule our requirements for short-spaced applications based on the consent of co-channel licensees, thereby eliminating the need to process short-spacing requests of this nature by waiver. In February of 1990, we issued a *Notice* proposing to adopt such a rule and to make it applicable to all channels in the SMR Category. With regard to the specifics of the proposed rule, we indicated our intention to retain the requirement that the systems of all concurring co-channel licensees be constructed and fully operational, noting that these requisites are viewed as factors justifying a waiver grant. We stated, however, that applicants wishing to short-space with an unconstructed system would continue

to be able to have their requests considered on a case-by-case waiver basis. Similarly, although the disposition of short-spacing requests based on technical showings of non-interference rather than the consent of co-channel licensees was not specifically at issue, we indicated that the waiver process would remain available to such applicants.[14]

7. Thereafter, upon further analysis of the issue of short-spacing requests based on technical studies, we tentatively concluded that the public would benefit from the codification of our policies regarding these applications as well. Because the disposition of this type of application was discussed only tangentially in the *Notice*, however, we issued a *Further Notice* in which we set forth the specifics of our proposal and solicited commenters' views. Although in the *Further Notice* we proposed certain requirements intended to provide applicants guidance concerning the information that should be submitted as part of a technical short-spacing application,[15] we explicitly requested commenters to discuss the adequacy of the suggested components and solicited their views as to whether additional standards should be adopted to ensure the reliability of any non-consensual short-spacing process.[16]

8. The commenters responding to the *Notice* unanimously support our proposal to permit consensual short-spacing without requiring a waiver of 47 C.F.R. § 90.621(b).[17] These commenters generally contend that consensual short-spacing arrangements are desirable because they prevent unnecessary rigidity in the licensing process and maximize the effective use of available spectrum.[18] Likewise, several commenters stress that dispensing with the waiver requirement will speed the processing of applications and will conserve the resources of applicants and the Commission alike.[19] Various commenters disagree with our proposal to retain the requirement that the systems of all concurring co-channel licensees must be constructed and operational, however, and instead suggest that concurrences from unconstructed licensees be accepted in certain circumstances.[20] The majority of commenters responding to the *Further Notice* also express support for our overall proposal to permit technical short-spacing on a non-waiver basis.[21] These commenters maintain, however, that any codified technical short-spacing procedure must be accompanied by the adoption of a standardized method for determining permissible proximity that accurately reflects the parameters of existing stations' service areas. In this regard, the commenters suggest that a 40/22 dBu contour analysis be used in place of the traditional 40/30 dBu ratio.[22] Several commenters also urge that additional safeguards designed to protect the interests of existing licensees, such as a requirement that the short-spacing applicant serve a copy of the application on all co-channel licensees or a rule stipulating that short-spaced licensees shoulder the responsibity for curing any resultant interference, should be adopted.[23] Only SIRSA directly opposes the technical short-spacing proposal, contending primarily that short-spacing applications based on technical studies must be examined on a waiver basis in order to prevent post-licensing interference disputes.[24]

III. DISCUSSION

A. Consensual Short-spacing

9. Our review of the record persuades us that the public interest will be well-served by the adoption of our proposal to eliminate the need for short-spaced applicants in the SMR Category to secure a waiver of 47 C.F.R. § 90.621(b) when the consent of all constructed, operational co-channel licensees has been obtained. We have long recognized that consensual short-spacing arrangements of this nature benefit SMR applicants, SMR end-users and the Commission by allowing for flexibility in the licensing process and, in so doing, permitting more intensive use of the radio spectrum. Illustrative of this point are the comments filed by various SMR licensees indicating that short-spacing enabled them to be licensed expeditiously for channels that they otherwise would have had to wait years to use simply because of the existence of the 70-mile separation standard.[25] Furthermore, as stated in the *Notice*, it is administratively convenient and consistent with the public interest to permit consensual short-spacing on a non-waiver basis. Specifically, the elimination of the waiver requirement will conserve Commission resources by expediting the review process, thus enabling our licensing staff to concentrate on more complex matters. Also, we have been able to observe the successful operation of existing rules similar to our consensual short-spacing proposal. For example, our existing rules allow the licensing of multiple address systems in the 928-960 MHz band without regard to established criteria if the applicant submits an engineering analysis and all affected parties agree to the calculated interference levels.[26] Similarly, certain trunked land mobile systems that do not satisfy specified contour criteria may nevertheless be licensed if all affected licensees agree in writing.[27]

10. As indicated, the commenters are divided with respect to whether we should retain our requirement that the systems of all co-channel licensees consenting to a short-spacing agreement must be constructed and in operation. Those parties favoring the retention of this requirement generally contend that it is necessary to deter trafficking of licenses and to preserve the use of waiting lists as the basis for reassigning the channels of licensees that fail to meet construction deadlines.[28] Commenters opposing the retention of the constructed and operational requirement generally maintain that it is unduly restrictive and could work to the disadvantage of licensees seeking to coordinate with assigned but unconstructed systems separated by less than 70 miles.[29] Several of these commenters suggest that less restrictive measures be adopted to prevent *de facto* assignment of unconstructed systems.[30] For example, RMD suggests that the Commission permit licensees with unconstructed systems to consent to short-spacing proposals, but that the short-spacing applicant and unconstructed consenting licensees be required to certify that no consideration in excess of reasonable expenses has been paid or promised in exchange for the concurrence.[31]

11. We have carefully considered all aspects of this issue and conclude that our practice of requiring the systems of all consenting co-channel licensees to be constructed and in operation serves a crucial function and must be retained. Clearly, in certain circumstances, it is beneficial to allow licensees with unconstructed systems to participate in consensual short-spacing arrangements.[32] Permitting arrangements of this nature on a non-waiver basis could,

however, contravene the intent of Section 90.609(b) of our Rules, 47 C.F.R. § 90.609(b),[33] by encouraging transfers of bare licenses.[34] Although RMD's proposal may be sufficient to discourage this type of conduct in some circumstances, the potential difficulty inherent in the enforcement of rules such as those suggested by RMD leads us to conclude that it is more desirable to continue processing short-spacing arrangements involving unconstructed co-channel licensees on a waiver basis. Accordingly, we will retain our requirement that the systems of all co-channel licensees consenting to a short-spacing proposal must be constructed and in operation. Applicants seeking to short-space with co-channel licensees whose systems are unconstructed must request a formal waiver.

12. In addition, we agree with the recommendation advanced by SIRSA that consensual short-spacing applicants should be required to serve all consenting co-channel licensees with a copy of their actual application.[35] Accordingly, we are incorporating into our rules the requirement that consensual short-spacing applicants attach to applications filed with the Commission a certificate of service indicating that all consenting co-channel licensees have been served with a copy of the application itself.[36] We do not, however, agree with SIRSA's suggestion that a party granted a consensual short-spacing authorization should be required to resolve any resulting interference to previously authorized co-channel systems.[37] Under our consensual short-spacing policy, a co-channel licensee's consent is not given with the understanding that no interference will be caused to its system. Rather, the consent itself is an agreement to accept any level of interference caused by the short-spaced applicant's operations. We are including a provision in our consensual short-spacing rule clarifying precisely this point.

B. Technical or Non-consensual Short-spacing

13. As mentioned, a majority of the commenters responding to the *Further Notice* favor our proposal to permit technical short-spacing on a non-waiver basis.[38] These commenters emphasize, however, that if the Commission removes technical short-spacing applications from the waiver process, it must adopt a new standardized method for determining the permissible proximity between the stations of applicants and existing co-channel licensees. Generally, the contention advanced by the commenters in this regard is that the 40/30 dBu analysis should not routinely be used for calculating separation distances of less than 113 km (70 miles) because it fails to reflect accurately the present-day operating parameters of SMR systems.[39] Over the past decade, significant technological advancements in transmission methods and radio design have enabled reliable land mobile communications to extend beyond those areas anticipated in 1974 when the 40/30 dBu criteria were developed. Although on the whole, the 70-mile rule has solid underpinnings and should continue to serve as the primary basis upon which SMR systems are assigned, we agree with the commenters that assignment criteria more responsive to contemporary SMR operating conditions are required where non-waiver technical short-spacing requests are at issue. The removal of the waiver requirement will be likely to increase the number of these applications, making Commission review more burdensome. In such circumstances, the proper balance between the desirability of making the non-consensual short-spacing option more widely available and the concomitant need to provide existing SMRs a reasonable degree of protection against interference can be achieved only through the establishment of a judicious assignment standard.

14. The Commission and the SMR industry have expended considerable time and effort in an attempt to devise an assignment standard that will maximize the interests of all affected parties. After much analysis, we agree with the industry's recommendation that the use of a 40/22 dBu standard for determining the necessary degree of separation between short-spaced stations best achieves this goal. The 40/22 dBu standard is somewhat more conservative than the 40/30 dBu ratio. As discussed above, however, the additional degree of protection afforded to existing stations under this standard is warranted in the non-waiver context.[40] In addition, to allow existing stations to retain the option of expanding their operations in the event that numerous short-spaced co-channel applicants become licensed, the 40/22 dBu calculation will be performed on the basis of the assumption that all existing systems are operating at maximum antenna height and maximum power.[41]

15. Employing analyses based on the above, we have devised a table to be incorporated in our rules that reflects the permissible separation for stations of various antenna heights and power capacity.[42] Applicants seeking to be licensed for systems within 113 km (70 miles) of existing co-channel licensees may use this table to discern the required separation of the proposed system.[43] Because this table will be codified, causing our rules explicitly to permit the spacings shown therein, applicants satisfying its terms will be permitted to "short-space" in this manner without procuring a waiver. Applicants seeking to satisfy the traditional 40/30 dBu interference ratio may still attempt to do so, but only on a waiver basis.[44]

16. Several commenters suggest that non-consensual short-spacing proposals involving so-called "ESMR" systems, in the role of either the applicant or the pre-existing licensee, necessitate certain special rules. For example, various commenters maintain that when a so-called ESMR seeks a short-spacing authorization, affected pre-existing licensees should be given an additional 5-mile separation area in order to prevent potential interference caused by the cumulative effect of multiple ESMRs.[45] Similarly, certain commenters suggest that when an existing ESMR is being short-spaced by a single-site SMR, the actual (as opposed to the maximum permissible) power and antenna height of the ESMR should be used to determine the acceptable separation of the two systems.[46] Our rules do not, however, distinguish between single-site SMR systems and low-power, multi-site SMRs. Indeed, in our recent decision authorizing the type of low-power, multi-site systems at issue, we explicitly stated that they are merely SMRs that utilize a unique engineering design.[47] Moreover, any decision to segregate SMR systems on the basis of these types of characteristics would necessitate consideration of numerous issues that have not been included in the record of the instant proceeding and, as such, is clearly beyond the scope of this action. Finally, the rule changes adopted in this proceeding are already more conservative than existing criteria by 8 dB. Thus, in effect, the new rules give all relevant co-channel systems, whether comprised of a single-site or multiple low-power sites, a built-in 8 dB "buffer" of protection against interference.[48]

17. Because our rules will explicitly permit "short-spacing" consistent with the terms of the table, it is unnecessary to require applicants proceeding thereunder to provide notice to existing co-channel licensees.[49] The arguments advanced by several commenters with respect to the merits of a notice requirement in the waiver context, however, raise a more imperative concern.[50] Accordingly, applicants proceeding via waiver will be required to file with their license application a certificate of service indicating that, concurrent with the filing of the application with the Commission, all co-channel licensees were served with a copy of the application and all attachments thereto.[51] Affected co-channel licensees wishing to challenge the application may then do so by filing an opposition within 10 days of the filing of the application as provided in Section 1.45(a) of our Rules, 47 C.F.R. § 1.45(a).

18. The final issue remaining for our consideration is whether non-consensual "short-spaced" licensees, authorized under either the table or by virtue of a waiver grant, should be required to bear the burden of remedying conflicts that may result from their operations. Some commenters favor the imposition of a requirement to this effect.[52] We conclude, however, that any such stipulation is unnecessary and undesirable. Under our rules, licensees are not guaranteed that they will be able to deliver interference-free service. Our rules only provide that a good quality of service ordinarily can be achieved if SMR stations are separated by 113 km (70 miles) or, as of today, lesser distances capable of maintaining the more conservative 40/22 dBu interference ratio. Clearly, it would be inequitable to adopt a rule requiring incoming licensees to take curative action designed to give existing licensees more than that to which they were initially entitled. Moreover, a rule to this effect would likely serve as a disincentive to the goal we are trying to accomplish in this proceeding, enhancing the availability of the short-spacing option, by having a chilling effect upon newcomers. In light of the above, we believe that the most that our rules can do is to encourage licensees to resolve interference disputes through mutual cooperation.[53] In our experience, this policy has generally proved successful and should not be changed.

IV. CONCLUSION

19. In conclusion, in this *Report and Order* we have attempted to formulate rule changes that will maximize the availability of the short-spacing option for SMR Category applicants while at the same time providing adequate safeguards to existing SMR licensees. We believe that the action taken in this proceeding accomplishes this goal and consequently promotes the public interest by ensuring that the SMR industry is one characterized by the efficient use of spectrum, a diverse number of providers and high service quality.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

20. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need for and Purpose of this Action

21. Many SMR systems find it technically possible and/or mutually desirable to locate their systems closer together than the separations prescribed in our rules. Such "short-spacing" fosters spectrum efficiency through frequency re-use. It has therefore been the Commission's policy to grant waivers of the separation criteria under several circumstances. This *Report and Order* incorporates the Commission's consensual waiver process and a variation of the technical waiver procedure into our rules, thereby eliminating the need for waivers in these circumstances.

Issues Raised in Response to the Initial Regulatory Flexibility Analysis

22. None of the commenters specifically addressed the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered and Rejected

23. The Commission considered all of the alternatives in this proceeding and considered all of the timely filed comments directed to the issues raised in both the *Notice of Proposed Rule Making* and the *Further Notice of Proposed Rule Making*. Aside from maintaining the *status quo*, there are no alternatives other than those considered in this *Report and Order*.

VI. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in the Appendix below, *effective* [thirty days after publication in the Federal Register].

25. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

26. For further information, contact Karen Kincaid or Ron Netro, Rules Branch, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 of the Commission's Rules is amended as follows:

1. The authority citation for Part 90 continues to read:

AUTHORITY: Sections 4, 303, 331 48 Stat., as amended, 1066, 1082; 47 U.S.C. § 154, 303 and 332 unless otherwise noted.

2. 47 C.F.R. § 90.621 is amended by revising paragraphs (b), (b)(1) and the first sentence of (b)(3), and by adding new paragraphs (b)(4) and (b)(5) to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

(b) Systems authorized on frequencies in the SMRS Category will be afforded protection solely on the basis of fixed mileage separation criteria. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account. The ordinary separation between co-channel systems will be 113 km (70 miles) with the following exceptions:

(1) No trunked system will be less than 169 km (105 miles) distant from co-channel trunked systems authorized 1 kw ERP on any of the following mountain top sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California).

* * * * *

(3) SMR trunked systems located in the State of Washington at the following locations shall be separated from co-channel systems by a minimum of 169 km (105 miles).
* * *

(4) The following Table indicates permissible distances between co-channel systems separated by less than 113 km (70 miles). Applicants seeking to be licensed for systems located at distances less than those prescribed in the table are required to secure a waiver and to file with their license application a certificate of service indicating that, concurrent with the filing of the application with the Commission, all co-channel licensees within the applicable area were served with a copy of the application and all attachments thereto.

Distance (km) of Proposed Facility from Existing Facility 1/ 2/

Proposed Facility*

HAAT (m)	HAAT (feet)	ERP (watts) 1000	800	600	400	200	100	50
30.5	100	108	107	102	95	87	80	80
61	200	113	111	106	103	95	89	82
91.5	300	113	113	113	108	98	95	89
122	400	113	113	113	113	105	100	92
152.5	500	113	113	113	113	109	102	97
183	600	113	113	113	113	113	104	98
213.5	700	113	113	113	113	113	106	100
244	800	113	113	113	113	113	108	104
274.5	900	113	113	113	113	113	110	106
305	1000	113	113	113	113	113	112	108

* Applicants whose exact ERP and HAAT are not reflected in the table must use the next highest figure shown. Distances shown are in kilometers.

1/ Separations for trunked systems on Santiago Peak, Sierra Peak, Mount Lukas, and Mount Wilson (California) and the locations in the State of Washington listed in 47 C.F.R. § 90.621(b)(3) are 56 km (35 miles) greater than those indicated in the table above. In the event of a conflict between this table and 47 C.F.R. § 90.621(b)(2)(ii), the latter will control.

2/ The distances shown are based on a non-overlap of the 22 dBu interference contour of the proposed station with the 40 dBu service contour of the existing station(s). No consideration has been given between the 40 dBu service contour of the proposed station and the 22 dBu interference contour of existing station(s).

(5) The separation between co-channel systems may be less than the separations defined above if an applicant submits with its application letters of concurrence indicating that the applicant and each co-channel licensee within the specified separation agree to accept any interference resulting from the reduced separation between their systems. Each letter from a co-channel licensee must certify that the system of the concurring licensee is constructed and fully operational. The applicant must also submit with its application a certificate of service indicating that all concurring co-channel licensees have been served with an actual copy of the application.

* * * * *

FOOTNOTES

[1] ASNA Petition for Rule Change, RM-6666 (January 24, 1989) (ASNA Petition).

[2] Notice of Proposed Rule Making, PR Docket No. 90-34, 5 FCC Rcd 1135 (1990) [hereinafter *Notice*].

[3] Pursuant to this rule, the primary site of each system licensed on frequencies in the SMR Category must be located at least 70 miles from the primary site of any co-channel system (except on certain mountain peaks in California and Washington where the separation must be at least 105 miles).

[4] *Notice*, 5 FCC Rcd at 1136.

[5] Further Notice of Proposed Rule Making, PR Docket No. 90-34, 6 FCC Rcd 975 (1991) [hereinafter *Further Notice*].

[6] At the outset, we wish to make clear that the rule changes enunciated herein are applicable solely to those channels in the SMR Category. As such, the rules set forth in this *Report and Order* will not apply to non-SMR Category channels that may be available to SMR systems, such as the 150 General Category channels, *see* Report and Order, PR Docket No. 87-213, 5 FCC Rcd 4016 (1990), or to other channels available to SMR systems through intercategory sharing. *See also infra* note 23.

[7] *Further Notice*, 6 FCC Rcd at 975.

[8] *See* First Report and Order and Second Notice of Inquiry, Docket No. 18262, 35 Fed. Reg. 8644 (June 4, 1970). *See also* Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974) (subsequent history omitted).

[9] Second Report and Order, Docket No. 18262, 46 FCC 2d at 775.

[10] *Id.* The acceptable interference level was determined to be one at which an undesired signal is 10 dB lower than a desired signal.

[11] *Id.* The mileage separation requirements are somewhat greater for certain sites in California and Washington State. *See* 47 C.F.R. § 90.621(b).

[12] *See* 47 C.F.R. § 90.621(b). *See also Further Notice*, 6 FCC Rcd at 975.

[13] *Further Notice*, 6 FCC Rcd at 975.

[14] *Notice*, 5 FCC Rcd at 1135-36.

[15] *See Further Notice*, 6 FCC Rcd at 976.

[16] *Id.*

[17] *See* Comments of the American Private Radio Association (APRA); the American SMR Network Association, Inc. (ASNA); the National Association of Business and Educational Radio, Inc. (NABER); Motorola, Inc.; Dispatch Communictions, Inc. (DisCom); Pacific Telepage, Inc.; Hendrix Electronics, Inc.; and RAM Mobile Data, Inc. (RMD). The Special Industrial Radio Service Association, Inc. (SIRSA) expresses support for the proposal provided that (1) the short-spacing proponent be required to serve a copy of the short-spacing application upon all co-channel licensees; and (2) the party granted the short-spacing authorization be required to resolve any resulting interference to previously authorized co-channel systems. *See* Comments of SIRSA at 5-6 (filed March 19, 1991).

[18] *See, e.g.*, Comments of ASNA at 4-5; Comments of APRA at 3; Comments of Pacific Telepage, Inc. at 4; Comments of Motorola, Inc. at 2; Comments of Hendrix Electronics, Inc. at 3.

[19] Comments of NABER at 3; Comments of APRA at 3; Comments of Motorola, Inc. at 2; Comments of Pacific Telepage, Inc. at 3-4; Comments of Hendrix Electronics, Inc. at 3.

[20] *See* Comments of RMD at 2-3. *See also* Comments of NABER at 3-4; Comments of Pacific Telepage, Inc. at 4-5; Comments of Hendrix Electronics, Inc. at 4.

[21] *See generally* Comments of ASNA; Comments of NABER; Comments of Fleet Call, Inc.; Reply Comments of the Council of Independent Communications Suppliers (CICS); Reply Comments of Regional Communications, Inc., et al.; Comments of Johnson Communications Corporation.

[22] *See* Reply Comments of ASNA at 3; Reply Comments of NABER at 6; Reply Comments of Regional Communications, Inc., et al. at 3; Reply Comments of CICS at 10; Reply Comments of Fleet Call, Inc. at 7; Reply Comments of Raymond C. Trott, P.E. at 3; Reply Comments of Advanced Mobilecomm, Inc. at 3; Reply Comments of Motorola, Inc. at 4.

[23] *See, e.g.*, Comments of ASNA at 7-10; Comments of NABER at 13-14; Comments of Mobile Communications, Inc. at 3-4; Reply Comments of CICS at 13-14. Several non-SMR licensees submitted comments in response to the *Further Notice* expressing concern that the adoption of the technical short-spacing proposal could impair their co-channel operations by causing interference thereto. These parties suggest that any procedural rules adopted in an effort to protect the operations of existing SMR licensees be made applicable to non-SMR licensees as well. *See generally* Comments of Southern California Edison Company; Comments of Phillips Petroleum Company; Comments of Consolidated Edison Company; Reply Comments Northern States Power Company; Reply Comments of Exxon Communications Company. As stated in note 6, *supra*, the action taken herein is applicable solely to channels in the SMR Category. Licensees in the SMR Category and non-SMR licensees such as the commenters in question could only be co-channel licensees on frequencies in the General Category Pool or by virtue of an intercategory sharing arrangement. The rules governing the General Category Pool and any non-SMR frequencies available through intercategory sharing are not affected by the action taken herein, and comments directed to the assignment of these channels are therefore misplaced. Moreover, under our existing policies, the rules governing SMR Category channels are applicable to all licensees using these frequencies, including non-SMRs licensed by virtue of an intercategory sharing arrangement.

[24] *See generally* Comments of SIRSA (March 19,1991).

[25] *See* Comments of Pacific Telepage, Inc. at 3; Comments of Hendrix Electronics, Inc. at 3.

[26] *See* 47 C.F.R. §§ 94.63(d)(4)(i), (ii), (iii)(D).

[27] *See* 47 C.F.R. § 90.621(c).

[28] *See* Comments of DisCom at 4; Comments of Motorola at 2-3; Reply Comments of ASNA at 4.

[29] *See* Comments of RMD at 2.

[30] *See, e.g.*, Comments of APRA at 3; Comments of RMD at 2-3. Pacific Telepage, Inc., NABER and Hendrix Electronics, Inc. favor the removal of all restrictions upon the participation of licensees with unconstructed systems, including the payment of consideration in exchange for their consent. *See, e.g.*, Comments of NABER at 3-4; Comments of Pacific Telepage, Inc. at 4-5; Comments of Hendrix Electronics, Inc. at 4-5.

[31] *See* Comments of RMD at 2-3; Comments of APRA at 3-4.

[32] For example, licensees with unconstructed systems may find short-spacing arrangements helpful in preconstruction planning to ensure complete coverage of locations that would otherwise not be served adequately. *See* Comments of RMD at 2. In addition, the "unconstructed" licensee might clearly intend to construct, such as a licensee recently authorized additional frequencies on a fully loaded system, or a licensee who recently

elected to relocate an existing system. It is also beneficial to permit a short-spacing applicant to proceed upon the basis of the consent of an unconstructed co-channel licensee in an effort to prevent the applicant from suffering unnecessary delay while having to wait for the unconstructed co-channel licensee to construct its system.

[33] Section 90.609(b) prohibits the transfer of SMR licenses prior to construction.

[34] Assume, for example, that Licensee A does not intend to construct its system but concurs to the short-spacing of Licensee B. Upon Licensee A's failure to construct within applicable deadlines, its license cancels automatically and the Commission recovers its channels as provided in 47 C.F.R. §§ 90.631(e) and (f). Because of the existence of Licensee B, however, the Commission cannot reassign the channels at Licensee A's location or, for that matter, at any point around Licensee A's station that is within 113 km (70 miles) of Licensee B. Thus, in effect, Licensee A's concurrence to the short-spacing arrangement could amount to an assignment of an unconstructed system to Licensee B.

[35] *See supra* note 17.

[36] *See* 47 C.F.R. § 1.47.

[37] *See supra* note 17.

[38] *See supra* note 21.

[39] *See, e.g.*, Comments of ASNA at 4-5; Comments of NABER at 7-8; Reply Comments of Fleet Call, Inc. at 7; Reply Comments of SIRSA at 7; Reply Comments of Raymond C. Trott, P.E. at 3-4; Reply Comments of CICS at 10.

[40] The 40/22 dBu analysis yields an 18 dB desired to undesired signal strength ratio as opposed to the 10 dB desired to undesired signal strength ratio produced under the 40/30 dBu analysis. Hence, the 40/22 dBu standard gives existing stations an 8 dB "buffer" of protection against interference.

[41] The commenters generally agree with this premise, at least where single-site SMRs are concerned. *See* Comments of NABER at 10-11. Several commenters contend, however, that in the case of so-called "ESMRs," only the actual power and antenna height of existing systems should be considered. This contention is outside the scope of the instant proceeding. *See infra* para. 16. As is currently our practice in the non-consensual short-spacing waiver context, the 40/30 dBu analysis will ordinarily be calculated using affected existing co-channel licensees' maximum permissible power given their actual AAT. Waiver applicants are not, however, specifically precluded from performing their analyses on the basis of existing stations' actual operating parameters. *See infra* note 44.

[42] Specifically, in calculating the distances reflected in the mileage separation table, we assumed all existing facilities to be operating at 1000 watts ERP and 305 meters (1000 feet) HAAT with an antenna height correction factor of 9 dB made to the FCC R-6602 curves. Existing facilities' 40 dBu contours were assumed to be at 47 km (29 miles) as determined from R-6602 F(50,50) curves. Existing facilities were provided an 18 dB desired to undesired signal strength ratio at the determined 40 dBu contour. The distances shown in the table indicate the distance by which an existing station and proposed stations of various power and antenna heights must be separated so that the 22 dBu contour (as determined from the R-6602 F(50,10) curves) of the proposed facility will not overlap an existing facility's determined 40 dBu contour. As indicated in the footnote to the mileage separation table, *see* Appendix *infra*, if the exact power or antenna height of a proposed system is not reflected in the table, the actual figure will be rounded up to the next highest number shown. In addition, it should be noted that for the purposes of administrative convenience, the distances set forth in 47 C.F.R. §§ 90.621(b), (b)(1) and (b)(3), where applicable in devising the table and otherwise, have been rounded up to the next closest figure.

[43] Co-channel separation at sites in Southern California and Seattle, Washington, where the required separation has traditionally been 169 km (105 miles), will be determined by adding 56 km (35 miles) to the distance reflected in the table. The matrix delineated in 47 C.F.R. § 90.621(b)(2) will continue to be used to determine co-channel separation at the applicable Northern California sites. We believe that the continued use of unique rules governing the proximity of SMR stations in these areas will adequately respond to the concerns of various commenters regarding the assignment rules for these regions. *See, e.g.*, Reply Comments of Commercial Engineering Corporation. Proposed spacing at any of these sites that fails to conform with either the calculations formulated on the basis of the table or the Northern California matrix, as the case may be, will continue to be examined on a case-by-case waiver basis. *See infra* note 44.

[44] The record adduced in this proceeding persuades us that the additional protection afforded by the case-by-case review of short-spacing applications is required where departures from the table are concerned. Applications for waiver of the table should include: (1) The identity of all co-channel stations; (2) diagrams showing the 30 dBu contours of the proposed station and the 40 dBu contours of existing stations; (3) specifications of the interference criteria and system parameters used in the interference study; and (4) a description of the propagation models, any engineering assumptions made and any special terrain features considered in the interference impact computation. *See Further Notice*, 6 FCC Rcd at 976. We are sensitive to the concern of certain commenters that these guidelines appear vague and leave open the possibility for the submission of a variety of technical analyses. *See, e.g.*, Reply Comments of CICS at 8-9. We believe that this degree of flexibility is necessary, however, to allow applicants to consider a variety of characteristics, including protection of existing stations' actual operating parameters, that may make satisfaction of the 40/30 dBu showing possible despite the proximity of the systems in question. Furthermore, we believe that the close scrutiny inherent in the waiver process will ensure that an adequate showing has been made despite the use of diverse analyses. We also appreciate those comments underscoring the availability of increasingly more accurate analytical techniques that may be employed to reflect interference potential. *See, e.g.*, Comments of NABER at 10 (discussing the use of the actual radial between stations); Reply Comments of SIRSA at 6 (discussing the use of 3-second versus 30-second terrain data). Manifestly, an applicant using these stringent methodologies is more likely to satisfy its burden of demonstrating that waiver is warranted. *See* WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *see also* 47 C.F.R. § 90.151. Finally, applicants seeking a waiver of the table will be required to serve all co-channel licensees within the applicable area with a copy of their application, thereby allowing affected parties to present their objections to the Commission. *See* para. 16, *infra*.

[45] *See, e.g.*, Comments of NABER at 11; Comments of ASNA at 7; Reply Comments of Motorola, Inc. at 4; Reply Comments of Regional Communications, Inc., et al at 9; Reply Comments of Advanced Mobilecomm, Inc. at 5.

[46] *See, e.g.*, Reply Comments of Motorola at 4; Reply Comments of Advanced MobileComm, Inc. at 5; Comments of NABER at 11.

[47] *See* In re Fleet Call, Inc., FCC No. 91-56 at para. 13 (February 13, 1991). Our rules were deliberately written with the flexibility to accommodate technological innovation so that new rules will not have to be established each time a new technology is introduced. *Id.*

[48] The record provides no adequate basis for measuring the cumulative effect of multiple emitters on interference potential. Moreover, even if a workable methodology for defining interference from multiple emitters were developed, we would have to assess the trade-offs between the public interest in promoting greater spectrum efficiency and any reduction in interference potential to pre-existing licensees.

[49] *See supra* note 23 and accompanying text.

[50] *See, e.g.*, Comments of ASNA at 8-9; Comments of NABER at 14; Comments of Mobile Communications, Inc. at 5; Reply Comments of CICS at 13-14; Reply Comments of Motorola, Inc. at 3; Reply Comments of Fleet Call, Inc. at 13. In general, these commenters contend that co-channel licensees should be served with a copy of the short-spacing proposal and given an opportunity to challenge the technical premises set forth therein.

[51] *See* 47 C.F.R. § 1.47.

[52] *See, e.g.*, Comments of ASNA at 10-11; Reply Comments of CICS at 13-14.

[53] *See* 47 C.F.R. § 90.173(b)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Certain Broadcast Stations
Serving Communities in the
State of Arkansas

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: July 29, 1991; Released: August 15, 1991

By the Commission:

1. The Commission has before it for consideration: (i) a Petition to Deny timely filed on May 1, 1989, by the National Black Media Coalition, the Arkansas State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), the Louisiana State Conference of Branches of the NAACP, the Mississippi State Conference of Branches of the NAACP, and various local NAACP branches (hereafter "NBMC/NAACP") against the above-captioned renewal applications;[1] (ii) oppositions from the licensees; and (iii) the licensees' responses to staff letters of inquiry. NBMC/NAACP allege that the above-captioned stations violated the Commission's equal employment opportunity (EEO) Rule and policies. NBMC/NAACP request that the Commission investigate the stations' employment practices and designate the renewal applications for hearing.

2. **PROCEDURAL MATTERS**. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988)(*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989) (*Dubuque*). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny was a declaration under penalty of perjury from Dale Charles, president of the Little Rock, Arkansas Branch of the NAACP, concerning KARN(AM). We find that Mr. Charles' declaration meets the requirements for establishing standing for his branch and for the Arkansas State Conference of Branches of the NAACP regarding that station. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). Accordingly, we find that the challenge filed by the Arkansas State Conference of Branches of the NAACP and the Little Rock Branch of the NAACP constitutes a valid petition to deny against KARN(AM).

4. Although the petition did not include a statement from a member of the NAACP against KIXK-FM, the petition did include a declaration under penalty of perjury from Rev. Ellihue Gaylord, president of the Arkansas State Conference of Branches of the NAACP, against all of the petitioned Arkansas stations. We note, however, that Rev. Gaylord did not state that he was a listener or resident of the listening areas of any of the Arkansas stations in the petition. Accordingly, we find that his statement is insufficient to establish standing as a petitioner against Station KIXK-FM. Accordingly, the NAACP will be considered an informal objector in its challenge against KIXK-FM in accordance with 47 C.F.R. Section 73.3584(b).

5. The petition contained a statement under penalty of perjury from the chairman of the NBMC, Pluria W. Marshall, of the Washington, D.C. metropolitan area. However, the Commission has held previously that the statement of a person who does not claim to be a listener of the challenged station nor a resident of its service area does not satisfy the standing requirements of the Act. *See Michigan / Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad.Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that the NBMC lacks standing to petition the above-listed Arkansas stations and we will treat its petition as an informal objection.

6. **DISCUSSION**. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

7. When a renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the application indicates inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters) (*Broadcast EEO*). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

8. NBMC/NAACP's factual allegations are derived from the stations' EEO programs and annual employment reports. Our review of those documents leads us to conclude that a *prima facie* case concerning non-compliance with our EEO rule was raised as to each of the stations. Section 309(d)(1) of the Act, 47 U.S.C. Sec. 309(d)(1).

Astroline, *supra*. However, after evaluating the three stations' EEO efforts in light of their oppositions and NBMC/NAACP's arguments, we find that there remain no substantial and material questions of fact requiring a hearing.

9. Review of NBMC/NAACP's allegations as well as each licensee's renewal application, opposition and response to our inquiry leads us to conclude that no substantial and material questions of fact remain with respect to each of the challenged licensees. Thus, grant of each application will serve the public interest. 47 U.S.C. Sec. 309(d)(2). *Astroline*, *supra*. Accordingly, we will grant renewal but with appropriate sanctions and/or remedies in two cases. Our analysis of each licensee's EEO efforts follows.

KARN (AM), Little Rock

10. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 70 overall and 64 upper-level full-time hiring opportunities from January 1, 1986 until December 31, 1989.[2] The general recruitment sources and minority referrals are as follows: *Broadcasting*, *Radio & Records*, *Arkansas Gazette* (two), *Arkansas Democrat* (one), University of Central Arkansas, University of Arkansas at Little Rock (one), a high school, the Columbia School of Broadcasting in Memphis, Tennessee (two), employment agencies (two), other stations (one), the licensee's employees and the National Organization for Women. The minority-specific sources contacted for the above openings and minority referrals are as follows: NAACP, Urban League (two), Philander Smith College (two), Capital City Junior College (two), Shorter College, University of Arkansas at Pine Bluff, a high school, the Minority Business Development Center (one), Pulaski County Equal Opportunity Agency, and the *Arkansas State Press* (one). Station records indicate that minority-specific sources were contacted for 21 of the 70 openings (30%). The licensee indicated that it interviewed 135 applicants for the 70 openings, 10 of whom were minorities (7.4%). Four of the 70 hires were minority (5.7%), three Blacks and one Hispanic. [3] The licensee recruited one Black and one Hispanic employee from a newspaper and another station, respectively, for specific positions.[4]

11. NBMC/NAACP assert that the station's EEO efforts throughout the license term were inadequate. They complain that the station's record of hiring few minorities during its license term in a market that is 17.3% minority (15.8% Black) is cause for an investigation or a hearing. They also specifically question why the station lost all four of its upper-level minorities (out of six overall minorities) from 1982 to 1983.

12. In opposition, the licensee asserts that the NBMC/NAACP were mistaken in their criticism of the licensee's record because the NBMC/NAACP looked at inaccurate Annual Employment Reports. In its opposition, the licensee provides revised information about its employment profile which shows that the licensee actually had fewer overall employees and more minority employees for six years of the license term. The licensee also submits several letters, including two from Black leaders in the community, that state that the station serves the minority community in its hiring practices. One community leader indicates in his letter that Blacks, who he has referred for jobs, have received "outstanding opportunities" at the station. Additionally, the licensee indicates that it hired seven Black students for upper-level positions during the license term with the goal of training them to become full-time employees. *See* fn. 4, *supra*. The licensee states that it evaluates its EEO program at least once a year and has changed it to include more minority recruitment efforts. While the licensee admits that the turnover with its minority employees has been "significant,"[5] it maintains that its minority recruitment has been active and includes out-of-state sources. The licensee also points out in its opposition that it "regularly added new minority employees to replace departing minority employees." The licensee denies that it has ever discriminated and points out that the station has no record of discrimination complaints. Repeatedly maintaining in its opposition that it is at or near "parity" with the minority workforce in Little Rock, the licensee states that it complied with the Commission guidelines and will continue efforts to "maintain compliance" with guidelines in the future.

13. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. Moreover, it is apparent that the licensee in fact engages in significant efforts to recruit and hire minorities. *See* paragraphs 10, 12 and accompanying footnotes, *supra*. However, the record also suggests that the licensee's efforts can be improved to obtain a more diverse pool of applicants. This is especially evident from the fact that only 10 of 135 interviewees were minorities. Accordingly, instead of contacting minority-specific sources for only 30% of the job openings, a much greater use should be made of such contacts.

14. In reviewing the licensee's record, we note that the licensee asserted repeatedly throughout its opposition that it has been at or near "parity" with minority employment during the license term. As we have pointed out before, meeting or exceeding a 50% of parity guideline is not a "safe harbor" and neither exempts a licensee's EEO program from review by the Commission nor permits it to slacken or cease its recruitment efforts. *See Broadcast EEO*, *supra* at 3974; *Florida Broadcast Renewals*, 3 FCC Rcd 1930, 1933 (1988); and *Application of Tulsa 23 for Renewal of License of Station KOKI - TV, Tulsa, Oklahoma*, 4 FCC Rcd 2067, 2069 (1989) (*KOKI - TV*). Thus, contrary to the licensee's apparent belief, compliance with our EEO rules is not based on meeting or exceeding a numerical or percentage test.

15. Finally, we are concerned that six of the licensee's seven Annual Employment Reports for this term were inaccurate and were only corrected when the licensee filed its opposition to the Petition to Deny. Given the record as a whole here, it is clear that the licensee did not intentionally file inaccurate reports. However, it is equally clear from the number of such reports that the licensee did not exercise the type of oversight we expect of all licensees when filing required submissions with the Commission. Accordingly, we also caution the licensee to verify the accuracy of any and all of its reports to the Commission and to assure that it is in full compliance at all times with Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015.

16. In sum, we find that unconditional renewal of license is warranted. However, we will expect the licensee to pay strict attention to the matters raised in paragraphs 13 - 15, *supra*.

KOLL-FM, Pine Bluff

17. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry revealed that the licensee had 40 overall and 34 upper-level full-time hiring opportunities from December 1986 through June 1989.[6] The general recruitment sources contacted by the licensee during its license term include the University of Arkansas at Little Rock, the Arkansas Broadcasters Association, the *Arkansas Democrat* and *Pine Bluff Commercial*. The licensee also contacted American Women in Radio and Television (A.W.R.T.). The minority-specific sources contacted for the above openings include the Arkansas state NAACP office, the Urban League, Philander Smith College, Shorter College, NBMC, the University of Arkansas at Pine Bluff, the *Arkansas State Press*, and Black community leaders. The licensee's records and recollections concerning minority referrals, applicants and interviewees reveal that there was only one Black referral and that was made by a station employee. The station's records on the race of its applicants are incomplete. The licensee's response to our inquiry revealed that minority hires were the result of the one referral and walk-ins. Of the station's 40 full-time hires from the end of 1986 through June 1989, five were minorities -- two Indians and three Blacks, all for upper-level positions.[7]

18. In defense of its record, the licensee points out that it contacted numerous minority-specific sources and other sources likely to refer minority applicants as well as evaluated its minority recruitment and steadily increased its sources. Also, the licensee indicates that it started an intern program at local colleges aimed at attracting minority students. Although it had a high turnover in personnel, the licensee emphasizes that it has maintained steady employment of minorities. The licensee also points out that problems stemming from its attempts to stay on the air have hurt its minority recruitment. Lastly, the licensee states that it does not understand why its long and growing list of sources aimed at attracting minorities has not resulted in referrals but pledged to keep increasing the source list.

19. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. In this regard, we find no evidence indicating that the licensee engaged in discrimination. However, we are concerned that the licensee's recruitment sources provided no minority referrals. The only Black referral for any of the 40 positions came from an existing employee. Further, the licensee did not maintain an adequate record of its applicants in order to do self-assessment. Better records and self-assessment were needed because two of the licensee's three Black hires were walk-ins and the other Black employee was referred by an existing employee. We find this case similar to the record of WQAM/WKIS(FM) of Miami/Boca Raton, Florida in *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990). The licensee failed to track data such as race of interviewees. Although it used minority-specific recruitment sources, no minorities were referred by any of those sources during the renewal year. The licensee received minority referrals from its employees and a local newspaper. Also, the licensee did not keep complete records on applicants until after the license term expired. Such records are essential for adequate self-assessment. Consequently, the license of WQAM/WKIS(FM) was renewed with reporting conditions. Because the record of KOLL-FM is similar to that of WQAM/WKIS(FM), renewal with reporting conditions is warranted to monitor future performance.

KIXK-FM, El Dorado

20. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 45 overall (44 upper-level) full-time hiring opportunities from March 1, 1986, through April 25, 1989. The licensee's records reflect only one minority referral. This referral was from a station employee. The licensee also indicates that it sought applicants through the *Gavin Report*, on-air announcements, other stations, *Radio and Records*, *Job Market*, *American Radio and Television*, *Bobby Poe*, employee referrals, two general circulation newspapers and walk-in applicants. The licensee did not contact any minority specific sources. The inquiry response indicates that the licensee obtained at least 121 applications for the 45 full-time positions it filled. The licensee indicates, however, that it has incomplete information on the number of minority referrals and interviewees, the number of minority applicants referred by each source, and the number of minority applicants who contacted the station. Of the 45 overall full-time hires, seven (15.6%) were Blacks hired for upper-level positions. Three of the Black employees were hired from resumes on file at the station. Also, five of the Black employees only worked at the station between two and six months. We note, however, that job turnover among the non-minority staff was similarly high and job tenure short.[8] In this regard, the station's records indicate that 27 of the 38 non-minority full-time employees hired between March 1, 1986 and April 25, 1989, had left the station by June 1989. Of the 27 non-minority former employees, the average length of employment at KIXK-FM was 10 months and 11 non-minority employees only worked from two to six months.

21. NBMC/NAACP assert that the licensee's EEO efforts throughout the license term failed to include the use of minority recruitment sources and that the licensee ignored its stated EEO program. They indicate that the licensee employs too few minorities considering the racial composition of the local workforce.

22. In opposition, the licensee asserts that it used several trade publications, general newspapers read by all sectors of the community and magazines to publicize openings, that it received applications from minorities and that it hired seven Blacks for full-time upper-level positions during its ownership of the station. The licensee also states that it is difficult to retain Blacks in a market where they have better opportunities elsewhere. Additionally, KIXK-FM is a small station with only 10 to 12 full-time employees at any one time.

23. In view of the foregoing, we find no substantial and material question of fact to warrant a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. While there appears to be a lack of complete record-keeping regarding recruitment and interviewees, and a lack of information indicating active self-assessment, the licensee engaged in some hiring of minorities for its relatively small staff. We find this case to

be similar to that of WQSF-FM in Williamsburg, Virginia. *See Letter to Donald W. Cuthrell, Jr., Richmond Radio Limited Partnership*, 5 FCC Rcd 213 (1989) (*WQSF - FM*). In *WQSF -FM*, the station had 44 full-time upper-level hiring opportunities during the license term and hired five Blacks (11.4%) in an area with a 26.0% Black labor force. Until the last two months of the license term, WQSF-FM contacted a number of recruitment sources including only one minority-specific source for 32 of its openings. Accordingly, WQSF-FM's license was renewed subject to reporting conditions and a $2,000 forfeiture. Similarly, KIXK-FM hired the same number of full-time upper-level employees as WQSF-FM. In addition, both stations are located in areas with an almost identical Black labor force, both stations kept inadequate records of minority recruitment and KIXK-FM contacted no minority-specific sources while WQSF-FM contacted only one. Therefore, we will renew KIXK-FM's license subject to reporting conditions. In addition, we will impose a forfeiture of $2,000 for repeated failure to comply with Sections 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5) of the Commission's Rules.

24. Accordingly, *IT IS ORDERED*, that the petition to deny filed by the Arkansas State Conference of Branches of the NAACP and the Little Rock, Arkansas Branch of the NAACP against Station KARN(AM) and the informal objection filed by the named Arkansas branches of the NAACP against Station KIXK-FM *ARE DENIED*.

25. *IT IS FURTHER ORDERED* that the informal objection filed by the National Black Media Coalition *IS DENIED*.

26. *IT IS FURTHER ORDERED*, that the license renewal application for Station KARN(AM) *IS GRANTED*.

27. *IT IS FURTHER ORDERED*, that the license renewal applications for Stations KOLL-FM and KIXK-FM *ARE GRANTED* subject to the EEO reporting conditions specified herein.

28. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, this document constitutes a Notice of apparent Liability for forfeiture of $2,000 for the licensee of KIXK-FM.[9]

29. *IT IS FURTHER ORDERED*, that the licensees of Stations KOLL-FM and KIXK-FM file an original and one copy of the following information on February 1, 1992, February 1, 1993, and February 1, 1994:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[10]

(b) a list of employees as of the February 1, 1992 payroll period for the first report and as of the February 1, 1993 and the February 1, 1994 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

30. *IT IS FURTHER ORDERED*, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notices of Apparent Liability to the licensee as well as counsel for the NBMC and the NAACP.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] NBMC/NAACP's petition was originally filed against 24 radio stations, six of which are located in Arkansas, eight in Mississippi and 10 in Louisiana. This Memorandum Opinion and Order (*Order*) only addresses three of the petitioned Arkansas applications. These applicants are: Snider Corporation, licensee of KARN(AM), Little Rock, Arkansas (file no. BP-890125UJ); Southern Starr of Arkansas, Inc., licensee of KOLL-FM, Pine Bluff, Arkansas (file no. BRH-890201UC); and KIXK, Inc., licensee of KIXK-FM, El Dorado, Arkansas (file no. BRH-890201XG). The allegations against two of the other Arkansas stations and the Louisiana and Mississippi stations will be addressed in future orders. The sixth Arkansas station is KKYK(FM). Snider Corporation, one of the petitioned licensees, transferred the license of KKYK(FM) (erroneously called KARN-FM by NBMC/NAACP) to Shepard Communications of Arkansas, Inc., in August 1988 -- nine months before NBMC/NAACP filed their petition. In an unpublished letter dated December 28, 1989, the staff, by delegated authority, dismissed the petition against KKYK(FM) in accordance with Section 73.3584(d) of the Commission's Rules, 47 C.F.R. Section 73.3584(d), for failing to meet the requirements of 47 U.S.C. Section 309(d)(1). Also, by letter dated June 22, 1989, NBMC/NAACP withdrew their petition against KOLL-FM and asked that its license be renewed without conditions. However, we have reviewed the record of KOLL-FM *sua sponte* and will impose sanctions as explained herein.

[2] The licensee presented records for KARN(AM) and KKYK(FM) combined from January 1, 1986 to August 1, 1988. Because the licensee transferred the FM station to Shepard Communications of Arkansas, Inc. on August 1, 1988, the 1988-1989 information covers the AM station only.

[3] The Little Rock MSA includes 45.1% female and 17.3% minority, with Blacks comprising 15.8% of the total labor force and Hispanics comprising 0.7%. The licensee stated in its opposition to the Petition to Deny that its Annual Employment Reports for 1982 - 1988 were incorrect, usually by understating minorities and overstating total employees and amended them in its opposition. In 1989, KARN(AM) employed 29 employees overall (24 upper-level), including three (10.3%) Blacks, two (8.3%) of whom were upper-level. In 1988, the stations em-

ployed 50 employees overall (45 upper-level), including three (6.0%) Blacks, two (4.4%) of whom were upper-level. In 1987, the stations employed 51 employees overall (46 upper-level), including three (5.9%) Blacks, two (4.3%) of whom were upper-level. In response to our inquiry, the licensee reported that it hired an Hispanic woman for an upper-level position at the AM station in 1987, but that she did not work at the station long enough to be reported on an Annual Employment Report. In 1986, the stations employed 50 employees overall (43 upper-level), including four (8.0%) Blacks, two (4.7%) of whom were upper-level. In 1985, the stations had 49 overall employees (42 upper-level), including two (4.1%) Blacks, both upper-level (4.8%). For 1984, the stations had 46 overall employees (40 upper-level), including two (4.3%) Blacks overall and one Black (2.5%) upper-level. In 1983, the stations had 40 overall employees (34 upper-level), including two (5.0%) Blacks, both lower-level. For 1982, the stations had 48 overall employees (43 upper-level), including four (8.3%) Blacks overall and three Blacks (7.0%) upper-level. The stations also employed one lower-level American Indian (2.1%) and one upper-level Hispanic (2.1% of overall employees and 2.3% of upper-level employees). Neither this station nor any other included in this Order was challenged regarding its recruitment of women. Nonetheless, as is our practice in all cases, we reviewed all these stations' EEO efforts toward both women and minorities. We found the records of all stations included in this Order sufficient as regards the recruiting of women.

[4] The licensee's records indicate that it hired a Black female student in November 1982 as a part-time producer and writer and then promoted her to full-time news reporter in August 1984. She resigned in February 1987 to obtain a position at another radio station. The licensee hired a Black female student in April 1983, who worked for a year as a part-time producer while going to school. In August 1983, the licensee hired a Black male student as a part-time producer. He resigned in May 1985. In April 1984, the licensee hired a Black male student as a full-time producer. He shifted to part-time status because of his class load and then resigned in November 1985 to attend a different school in another area. The licensee hired a Black male student in January 1985 as a producer but he left in April 1987 to pursue a different career. A Black female student worked part-time at the station in 1986 and resigned at the end of the school year. The licensee hired a Black male student in 1988 as a part-time announcer who later resigned.

[5] The licensee explains in its opposition that minority employees left for various reasons, such as to return to school, to go to larger markets, or to go to television stations.

[6] By way of background, NBMC/NAACP filed a request to withdraw its Petition to Deny on June 26, 1989. We accept the withdrawal of the Petition. However, as with all cases, we have reviewed the record and renewal application of KOLL-FM *sua sponte*.

[7] The labor force of the Pine Bluff, Arkansas MSA is made up of 40.8% women, and 33.3% minorities (31.9% Black). KOLL-FM was acquired by the current licensee on May 30, 1986. At that time the station was combined with an AM station and they were called KZLR/KZLR-FM. Because of major technical work being done at the stations, they were off the air from June through December 1986 and did not start full broadcasting until May 1987. They started hiring for full-scale operations in April 1987. On December 15, 1988, prior to the FM station's application for license renewal, the AM station was assigned to a new licensee. The FM station later acquired its current call letters, KOLL-FM. Also, for the reporting periods prior to 1988, the AM-FM station combined employed fewer than five employees and did not file Annual Employment Reports. KOLL-FM indicated that its Annual Employment Reports were incorrect by describing two employees hired in 1987 as White when they are actually American Indians. The Report for 1989, along with the licensee's additional information, indicates that the station employed 20 employees overall (18 upper-level), of whom four (20.0%) were minorities, two (10.0%) American Indians and two Blacks, all (22.2%) in upper-level positions. The 1988 Report, along with the licensee's additional information, indicates that the AM-FM station combined employed 17 employees overall (16 upper-level), of whom three (17.6%) were minorities, two (11.8%) American Indians and one (5.9%) Black, all (18.8%) in upper-level positions.

[8] El Dorado, Arkansas is in Union County, whose available labor force is 40.0% female and 24.0% minority (23.3% Black). The station's Annual Employment Reports (FCC Form 395-B) indicate that it employed no minorities out of 10 overall employees in 1989, and no minorities out of 12 overall employees in 1988. In 1987, the station employed one minority out of 10 overall employees (10.0%), a Black employee in a lower-level position. In response to our inquiries, however, the licensee indicated that it hired seven Blacks for upper-level full-time positions during its ownership but that they did not work at the station long enough to be reported in Annual Employment Reports. KIXK, Inc. purchased the station in March 1986. Prior to the purchase, the 1986 Annual Employment Report indicated that all 10 of the station's employees were Black. The licensee indicated that only six former employees accepted its offer to apply for positions. Of these, the licensee hired four. According to the licensee, all four Black employees from the former staff voluntarily left over time "to take better jobs elsewhere." In fact, it appears that at least three of the four Black employees had departed by March 1987.

[9] In regard to the forfeitures, the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in an attachment to this Memorandum Opinion and Order and Notices of Apparent Liability. Any comments relating to ability to pay should include those financial items set forth in the noted attachment.

[10] Such a list might start: 1) News Director: Officials and Managers; Full-time. 3 Applicants: 1 White female, A.W.R.T.; 1 Black male, Urban League; 1 Black female, NAACP. Sources Contacted - Local Newspaper, A.W.R.T., Urban League, and NAACP. Selected - Black male (08/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-151

In the Matter of

Amendment of Section 73.202(b), RM-7557
Table of Allotments,
FM Broadcast Stations.
(Victoria and New Braunfels,
Texas)

ORDER DENYING REQUEST FOR EXTENSION OF TIME TO FILE REPLY COMMENTS

Adopted: August 12, 1991; Released: August 13, 1991

By the Assistant Chief, Allocations Branch:

1. On May 23, 1991, the Commission released a *Notice of Proposed Rule Making*, 6 FCC Rcd 3368 (1991), seeking comment on the reallotment of Channel 19, Victoria, Texas, to New Braunfels, Texas, and modification of Station KVCT(TV)'s license accordingly. The *Notice* stated that interested parties could file comments on or before July 29, 1991, and reply comments on or before August 13, 1991. On August 1, 1991, KVCT(TV), licensee of Channel 19, Victoria, Texas, filed a motion for extension of time requesting that the period to submit reply comments be extended to August 20, 1991. Counsel for KVCT(TV) notes that he will be out of office on a previously scheduled vacation the week of August 5, 1991, thereby reducing the amount of time available for preparation of a reply.

2. Section 1.46 of the Commission's Rules states that extensions of time shall not be routinely granted. We find that KVCT(TV) has not stated sufficient grounds for departure from this rule.

3. Accordingly, IT IS ORDERED, That the Request for Extension of Time submitted by KVCT(TV) IS DENIED.

4. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

5. For further information regarding this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-215

In the Matter of

Ameritech Transmittal No. 518
Operating Companies
Revisions to Tariff F.C.C. No. 2

United Telephone Transmittal No. 273
System Companies
Revisions to Tariff F.C.C. No. 5

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: August 5, 1991; Released: August 6, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. On May 28, and June 18, 1991, respectively, the Common Carrier Bureau released Orders initiating investigations of rates for 64 Kbps service by United Telephone System Companies (United) in Transmittal No. 273 and by the Ameritech Operating Companies (Ameritech) in Transmittal No. 518.[1] Both Orders stated that the Bureau would subsequently designate issues for investigation regarding these 64 Kbps rates. This Order designates those issues and establishes a pleading cycle.

II. BACKGROUND

2. Both transmittals at issue in this investigation were protested by MCI Telecommunications Corporation (MCI), who argued that the carriers' rates for 64 Kbps service are significantly above costs.[2] The Bureau concluded, based on our review of the transmittals, the associated pleadings, and all cost support submitted that the United and Ameritech transmittals may contain unreasonably high rates in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). We further concluded that because customers may be subject to excessive rates as a result of these new services, we would suspend the offerings for one day, impose accounting orders, and initiate an investigation of the reasonableness of those rates.

III. DESIGNATION OF ISSUES TO BE INVESTIGATED

3. The Bureau initiated this investigation to determine whether the United and/or Ameritech rates for 64 Kbps exceed a just and reasonable rate for that service. In order to assist the Commission in resolving that question, those carriers are directed to provide the following information in their direct cases with respect to the cost of providing 64 Kbps service:

(1) Explain the direct costs for 64 Kbps service. Provide a 12-month showing of these direct costs and include all supporting workpapers.

(2) Explain how the fixed cost loadings were determined. Explain also the ratio of direct unit cost to unit investment and direct unit cost to unit price for 64 Kbps and other similar special access services.

(3) Provide a study showing the effect of 64 Kbps service on demand and revenues, including the demand and revenues of other services. Include supporting workpapers for estimates of demand and revenues.

4. Each carrier may present arguments to justify its rates. In the event that a carrier claims that the rate for 64 Kbps service should include a risk premium, that carrier's direct case should provide the information described in paragraph 43 of the *Part 69 ONA Order*.[3]

5. We note that both carriers base their rates for 64 Kbps service on existing rates for other digital services.[4] Each carrier should explain why it believes this ratemaking methodology will produce a just and reasonable rate.

IV. PROCEDURAL MATTERS

6. This investigation will be conducted as a notice and comment proceeding. CC Docket No. 91-215 has been assigned for this purpose. Ameritech and United shall each file their direct case not later than September 17, 1991. The direct case shall present the carrier's position with respect to the issues described in this Order. Pleadings responding to the direct case must be filed not later than October 15, 1991, and must be captioned "Opposi-

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[1] United Telephone System Companies, Revisions to Tariff F.C.C. No. 5, Transmittal No. 273, 6 FCC Rcd 3334 (Com. Car. Bur. 1991) (*United Investigation Order*); Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Transmittal No. 518, 6 FCC Rcd 3716 (Com. Car. Bur. 1991) (*Ameritech Investigation Order*).

[2] *See United Investigation Order* at paras. 2-4 and *Ameritech Investigation Order* at paras. 2-5 for a summary of MCI's arguments and the carriers' responses to those arguments.

[3] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Final Order, FCC 91-186, para. 43, released July 11, 1991 (*Part 69 ONA Order*).

[4] For example, Ameritech provides cost data which reveal virtually no cost differences for its various digital data services, even though the rates for those various services vary significantly. *Ameritech Investigation Order*, 6 FCC Rcd 3716, 3716 para. 3 (Com. Car. Bur. 1991). United performed a simple linear regression of all its existing digital data service rates to arrive at its 64 Kbps service rate. *United Investigation Order*, 6 FCC Rcd 3334, 3334 paras. 3-4 (Com. Car. Bur. 1991).

tion to Direct Case" or "Comments on Direct Case." Ameritech and United may each file a "Rebuttal" to oppositions or comments not later than October 29, 1991.

7. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554.

8. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

9. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

10. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

V. ORDERING CLAUSE

11. IT IS ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS
Tariff F.C.C. Nos. 1 and 13

Transmittal Nos. 2902 and 3286

ORDER

Adopted: July 19, 1991; **Released: July 19, 1991**

By the Chief, Common Carrier Bureau:

1. AT&T Communications (AT&T) filed Transmittal No. 2902 on February 15, 1991, to introduce on a permanent basis a special discount for calls placed with an AT&T Card Issuer Identifier (CIID)/819 Calling Card. As proposed, customers who charge $30 or more of Long Distance Message Telecommunications Service (LDMTS) calls to an AT&T CIID/891 card account in a three-month calendar period would receive a credit for a discount of 15 percent applied to the charges on the account. AT&T Letter of Transmittal at 1. The credit would be paid to customers annually in the form of a negotiable instrument accepted by AT&T or its CIID/891 billing agents (or both) for telecommunications services, or a negotiable instrument redeemable for goods and services from participating vendors. *Id.* Transmittal 2902 is scheduled to become effective on July 20, 1991.

2. On March 4, 1991, Chase Manhattan Corporation, Citicorp, MasterCard International Incorporated, and Visa U.S.A., Inc. (Joint Petitioners) filed a petition to reject, or in the alternative, to suspend Transmittal 2902. AT&T replied to that petition on March 11, 1991. On May 29, 1991, AT&T filed supplemental cost information for its proposed 15 percent discount at the Bureau's request. The Joint Petitioners filed comments regarding the supplemental cost support on June 11, 1991, to which AT&T replied on June 14, 1991. The Joint Petitioners responded by letter to AT&T's June reply on June 24, 1991.[1] Finally, on July 16, 1991, AT&T filed Transmittal No. 3286 to reduce the discount on calls made with an AT&T CIID/891 calling card from 15 percent to 10 percent.

3. In their initial petition, the Joint Petitioners argue that Transmittal 2902 should be rejected because it violates Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). They claim that the tariff gives an undue preference -- a 15 percent discount -- to AT&T CIID/891 calling card customers not given to AT&T LDMTS customers who bill their calls to other credit and calling cards. Joint Petition at 5. According to the Joint Petitioners, the LDMTS service provided to AT&T CIID/891 cardholders is identical to the services provided to non-AT&T cardholders under any other calling or credit card, and AT&T has provided no justification for the price disparity between these services. Therefore, they argue, AT&T is discriminating in favor of AT&T CIID/891 calling card customers and against all other credit and calling card customers who use AT&T LDMTS. *Id.* at 68.

4. Alternately, the Joint Petitioners argue that if the Commission does not reject Transmittal 2902 as facially discriminatory, the tariff should be suspended to investigate whether it is consistent with the Commission's price cap regulations. They claim that, because AT&T does not apply a price cap to negotiable instruments redeemable with participating vendors, and has not demonstrated what percentage of the price reduction will be redeemed with such vendors, the filing does not contain material sufficient to calculate required adjustments to either the Actual Price Index or Service Band Index. Finally, the Joint Petitioners question whether AT&T should be allowed to exclude vendor-redeemable instruments from its price cap calculations. *Id.* at 10-11.

5. In its March reply, AT&T argues that the 15 percent discount proposed in Transmittal 2902 is not discriminatory because AT&T will provide an AT&T CIID/891 card to any customer who requests one, thus making the discount generally available to all similarly situated customers. AT&T March Reply at 3-4. In addition, AT&T argues that the services provided by CIID/891 cards are not "like" those provided by other calling or credit card because customers perceive the AT&T CIID/891 cards as more secure against fraud and more accurate for billing purposes than other cards. *Id.* at 5-6. Finally, AT&T argues that even if its CIID/891 cards are "like" other credit and calling cards, it can independently justify the discount on a cost basis. *Id.* at 6-7.

6. In their June 1991 comments, the Joint Petitioners argue that AT&T's market research included in the supplemental cost filing only bolsters the Joint Petitioners' contentions that AT&T CIID/891 cards are similar in all material respects to a commercial credit card. Therefore, argue the Joint Petitioners, the primary issue remains the disparate treatment of similarly-situated users of LDMTS based solely on their chosen method of payment. Comments at 3. The Joint Petitioners next argue that the supplemental cost information submitted by AT&T at times overstates the costs of processing calls billed to credit calling cards and ignores the costs of processing calls billed to AT&T CIID/891 cards. *Id.* at 5-8. In addition, they dispute AT&T's claims of additional costs for local exchange carrier (LEC) calling card validation, operator assistance, non-billable call attempts, fraud detection, uncollectible calls, and advertising and marketing expenses for LEC cards. *Id.* at 11-13. Finally, the Joint Petitioners argue that AT&T's supplemental cost information fails to justify the proposed discount as reasonable. *Id.* at 13-14.

7. In its June reply, AT&T argues that its market research conclusively demonstrates that customers perceive AT&T CIID/891 cards as significantly "unlike" LEC calling cards and, in particular, commercial credit cards. AT&T June Reply at 1-2. AT&T further claims that the Joint Petitioners have not refuted that AT&T incurs additional costs for processing commercial credit card calls because manual intervention is required to correct mismatched credit card and billing information. *Id.* at 5.

[1] Letter from D. L. Lagapa and M. K. O'Connell to Chief, Tariff Division, Common Carrier Bureau, June 24, 1991.

In addition, AT&T argues that there are higher costs associated with commercial credit cards because AT&T pays commissions on all calls billed to commercial credit cards. *Id.* at 6.

8. With regard to LEC cards, AT&T claims that those costs are higher as well because, *inter alia*, it must access a data base, pay LEC charges, and pay for Line Information Data Base (LIDB) validation of the LEC numbers. *Id.* at 7-8. Finally, argues AT&T, the Joint Petitioners' claim that AT&T has overstated costs associated with calling cards other than AT&T CIID/891 cards is without merit. *Id.* at 9.

9. In their June letter to the Chief, Tariff Division, the Joint Petitioners argue that AT&T has not provided a complete breakdown of its costs associated with each billing alternative, that AT&T's analysis of costs associated with commercial credit cards is misleading, and that AT&T distorts the costs of shared pay telephone commission expenses. Letter at 1-2. In addition, they contend that AT&T claims increased network costs associated with processing commercial credit cards calls but does not allocate such costs to the AT&T CIID numbers that are affixed to Universal cards, which are also commercial credit cards. *Id.* at 3.

10. The Common Carrier Bureau has reviewed the AT&T transmittals, the supplemental cost information filed by AT&T, and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

11. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate AT&T Communications Tariff F.C.C. Nos. 1 and 13, Transmittal No. 2902, filed by the Joint Petitioners IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HARRISCOPE OF CHICAGO, INC. *et al.*
A Joint Venture d/b/a VIDEO 44

MM DOCKET NO. 83-575
File No. BRCT-820802J9

For Renewal of License of
Station WSNS-TV, Channel 44
Chicago, Illinois

and

MONROE COMMUNICATIONS CORPORATION

MM DOCKET NO. 83-576
FILE NO. BPCT-821101KH

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1991; Released: August 20, 1991

By the Commission: Commissioner Quello dissenting and issuing a statement; Commissioner Barrett concurring and issuing a statement.

I. BACKGROUND

1. In this proceeding, the Commission denied the application of Video 44 for renewal of its license to operate station WSNS-TV in Chicago, Illinois, and granted the mutually exclusive application of Monroe Communications Corporation for a construction permit. *Video 44*, 5 FCC Rcd 6383 (1990). The Commission's action followed a remand by the United States Court of Appeals, which criticized a previous Commission action granting Video's application and denying Monroe's. *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990), *remanding*, *Video 44*, 4 FCC Rcd 1209 (1989). The court had faulted the Commission for failing to give adequate weight to the reduction in WSNS-TV's public service programming late in the license term.[1]

2. The Commission found that Video had not established that its performance during the 1979-82 license term was substantial and therefore deserving of a renewal expectancy preference to be taken into account in the comparative analysis. *See generally Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). The Commission made this finding because Video had reduced the amount of its nonentertainment programming during the course of the license term, in connection with its institution of almost full-time subscription television (STV) operation.[2] The Commission held that in the absence of a renewal expectancy, Monroe's preferences for integration of ownership into management and diversification of media control warranted grant of Monroe's application.

3. Video now seeks reconsideration of the denial of its application on several grounds.[3] For the reasons that follow, we deny Video's petition. In reaching this result, we are fully aware that denying renewal of a broadcast license is a weighty decision. We must emphasize, however, that our obligation is to administer the comparative renewal process mandated by Congress as interpreted by the courts under the prevailing law. Our action represents what we believe is the necessary application of that process.

II. RENEWAL EXPECTANCY

4. During the license term extending from December 1, 1979 to November 30, 1982, WSNS-TV's operations were converted in stages from conventional programming to nearly full-time STV programming. This conversion to STV operation resulted in a reduction in the amount of nonentertainment programming presented by the station. By August 1982, near the end of the license term, WSNS-TV cancelled most of its nonentertainment programming, including all news and local programming. Typically, in this latter part of the term, the station presented (during the time period from 6:00 to 7:00 a.m. weekdays, which was reserved for non-STV programming) the public affairs shows *Health Field*, produced by NBC, *Illinois Press*, produced by the University of Illinois, and a nonentertainment program called *Out and About*, produced by the University of Southern Illinois. The station also presented miscellaneous programs and PSAs during this time period. 5 FCC Rcd at 6383 ¶¶ 6-7.

5. The Commission assessed Video's performance in accordance with the Court's interpretation of its statutory responsibilities. As the Court directed (900 F.2d at 355-56), the Commission focused on WSNS-TV's performance after its conversion to almost full-time STV operation in evaluating Video's entitlement to a renewal expectancy. This late-term performance was deemed most probative of WSNS-TV's likely future performance, since the Commission had no basis for considering WSNS-TV's conversion to almost full-time STV operation other than permanent. The Commission agreed with the ALJ's conclusion that WSNS-TV's late-term performance represented a "wholesale abandonment of public service programming." 5 FCC Rcd at 6385 ¶ 18. The Commission adopted the ALJ's finding that:

> . . . WSNS-TV broadcast no news, no regular local programs, and effectively shut down its studios, telecast 4-5% non-entertainment programming and a drastically reduced PSA schedule at undesirable time periods - none in prime evening time.

Id.

6. In adopting this determination, the Commission evaluated WSNS-TV's performance using the standard traditionally applicable to broadcasters. *See* 5 FCC Rcd at 6386 n.4. The Commission thereby rejected Video's argument that its STV operation should not be evaluated under the traditional broadcast standard because, in 1987, the Commission reclassified STV operation as a nonbroadcast point-to-multipoint service. *Id.* at 6384-85 ¶¶ 11-17. *See*

Subscription Video, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988) (1987 STV order). *See also Subscription Video Services*, FCC 85-538 (Jan. 8, 1986), 51 Fed. Reg. 1817 (Jan. 15, 1986) (NPRM).

7. Video argued that the Commission should retroactively apply the new standard to the 1979-82 license term and suggested that under this standard the reduction of WSNS-TV's nonentertainment programming following its conversion to STV operation would not undermine its entitlement to a renewal expectancy. The Commission ruled that applying the new standard retroactively would undermine the policy underlying the granting of a renewal expectancy -- namely that, to function as an incentive, the renewal expectancy must be awarded for compliance with the standards in effect during the time period under review. 5 FCC Rcd at 6384-85 ¶¶ 16-17.

8. In its petition for reconsideration, Video renews its argument that the definition of STV as a nonbroadcast service, adopted in the 1987 STV order, should be retroactively applied to the 1979-82 license term. Alternatively, Video argues that it is entitled to a renewal expectancy even if WSNS-TV's late-term record is judged under the traditional broadcast standard.

9. To the extent that Video merely reiterates its prior position on the retroactivity of the 1987 STV order, we need not dwell on Video's arguments. It is well settled that the Commission will not grant reconsideration to review matters that it has already considered. *See WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). We wish, however, to comment on one point raised by Video. Video faults the Commission for commenting with approval on the view that the 1987 reclassification of STV was "a prospective exercise of administration discretion" rather than the correction of an erroneous interpretation of the Communications Act. 5 FCC Rcd at 6386 n.5. According to Video, because the 1987 STV order corrected a prior error, it should be applied retroactively.

10. We disagree with Video's contention that our prior actions preclude us from judging its record for renewal expectancy purposes under the traditional broadcast standard. Even assuming *arguendo* that our prior classification of STV as broadcasting could be considered erroneous, Video does not argue, nor could it, that it would be beyond our authority under the public interest standard of 47 U.S.C. §§ 308, 309 for us to to establish as a renewal expectancy standard that STV licensees must provide public service programming over frequencies allocated to the broadcasting service even though the STV licensees themselves are not broadcasters.[4] In this regard, the 1987 STV order did not address, much less modify, the renewal expectancy standard applicable to STV operators. Under these circumstances, the reclassification of STV does not mandate that an operator such as Video would be subject to a renewal expectancy standard different from that of a conventional operator.

11. Further, our application of the existing renewal expectancy standard in this situation does not lead to an anomalous or unjust result. We note that: (1) Video had notice of the Commission's pertinent directives that governed its STV operations during the renewal term under review; (2) establishment of a new standard would defeat the incentive effect of the comparative renewal process, as already discussed; and (3) a new standard would also unfairly burden Monroe, which has diligently prosecuted its case as a challenger. Thus, we adhere to the view that the conventional broadcast renewal expectancy standard can be properly applied to Video's performance.

12. As an alternative argument, Video contends that its performance as an STV operator should be considered substantial even if judged under the traditional broadcast standard. Video faults the Commission for basing its judgment that WSNS-TV's performance was less than substantial on: (1) the reduction in the quantity of nonentertainment programming, (2) the elimination of all news and local programming, and (3) the scheduling of nonentertainment programming during early morning hours. Video points out that in some past cases a broadcaster's record has been found substantial despite the presence of such factors. Video urges the Commission to focus on the responsiveness of its programming with respect to ascertained community problems and needs. In this regard, Video now attempts to expand its showing concerning the programming presented at the end of the license term to bolster its argument that its performance should be considered substantial. Video criticizes the Commission for suggesting previously (5 FCC Rcd at 6385-86 nn. 2-3) that no further inquiry into the responsiveness of WSNS-TV's late-term programming would be necessary.[5]

13. We see no merit to Video's contentions. We are not persuaded that WSNS-TV's late-term performance should be considered substantial in the face of the low quantity of WSNS-TV's nonentertainment programming and the other factors noted in the previous paragraph.[6] We do not dispute that a licensee has discretion in choosing the amount, source, and timing of programming. Thus, the presence of any of the factors noted in paragraph 11 does not necessarily preclude a finding that the station's performance has been substantial, based on the record as a whole. *See United Broadcasting Co.*, 93 FCC 2d 482, 496-98 ¶ 34 (1983) (amount of programming not dispositive); *WPIX, Inc.*, 68 FCC 2d 381, 402-03 ¶ 61 (1978) (source of programming, local versus non-local, not dispositive); *Pillar of Fire*, 99 FCC 2d 1256, 1264 ¶ 13 (Rev. Bd. 1984), *rev. denied*, 2 FCC Rcd 519 (1987) (lack of local news not dispositive); *Kaye-Smith Enterprises*, 98 FCC 2d 675, 684-85 ¶ 20 (Rev. Bd. 1984) (early morning timing not dispositive). Nonetheless, the amount of nonentertainment programming and local programming presented, and its timing, are relevant factors. Deficiencies in these areas, if not offset, reflect adversely on a station's responsiveness to the community. *See, e.g., Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756, 759, 762 (D.C. Cir. 1983); *Royce International Broadcasting*, 4 FCC Rcd 7139, 7143 ¶ 22 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 7063 (1990). Here, Video's performance was deficient in all of these respects, and we found no offsetting indications of merit.

14. With this in mind, we have examined Video's proffer, which seeks to demonstrate the responsiveness of WSNS-TV's late-term programming. We agree with Video's opponents that Video's showing should not be given probative weight. Procedurally, we find no justification for permitting Video to make a new programming showing when it had ample opportunity to characterize the merit of its programming during the hearing and in its comments following remand. *See Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580, 584 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971) (rejecting a belated programming showing). However, even considering the merits of Video's showing, we do not find it persuasive. A compari-

son between Video's current proffer and the programming exhibits already in the record indicates that Video now seeks to inflate the significance of its late-term programming in a manner that is inconsistent with the existing record. *Compare* Petition for Reconsideration, Affidavit of Alan Silverman, Exh. 3 *with* Video Exhs. 2, 3.[7] A self-serving attempt, such as this, to bolster the claimed merit of programming following an adverse decision has little credibility. Significantly, the record indicates that, in connection with its conversion to STV programming, Video cancelled its most responsive programming. For example, Video's record showing relied heavily on the locally-produced program, *Dimensions*, which was presented in prime time, to demonstrate the responsiveness of WSNS-TV's programming. *See Video 44*, 102 FCC 2d 419, 432-33 ¶¶ 28-30 (I.D. 1985). Similarly, *Dimensions* generated much of WSNS-TV's favorable public comments. Video cancelled *Dimensions* in connection with its conversion to STV. *Id.* at 433 ¶ 31. By contrast, Video does not claim that the program *Illinois Press*, which was presented after the cancellation of *Dimensions*, was responsive during late 1982 to any of the ten top community problems as ascertained from community leader interviews in 1982. Petition for Reconsideration, Affidavit of Alan Silverman, Exh. 3. (Video claims that *Illinois Press* was responsive to "Problems of Government and Leadership." *Id.*) Thus, the record in this case amply demonstrates the decline in Video's performance to a minimal level.

III. POST-TERM PROGRAMMING

15. In determining that Video was not entitled to a renewal expectancy, the Commission considered only the programming presented on WSNS-TV during the 1979-82 license term. 5 FCC Rcd at 6386 ¶ 6. This period represents the last license term immediately preceding the filing of Monroe's competing application. Video now asks the Commission to take into account WSNS-TV's more recent performance. Video points out that on July 1, 1985 (after the ALJ's adverse initial decision of February 21, 1985),[8] WSNS-TV adopted a Spanish language format. Video contends that, following the format change, WSNS-TV has provided highly meritorious service to Chicago's Hispanic community and that termination of this service would be a substantial detriment to the community. Video observes that WSNS-TV is Chicago's only station broadcasting full-time in Spanish. According to Video, WSNS-TV has presented large amounts of high-quality news and public affairs programming for the Hispanic community and has received numerous awards and widespread public support. Video also states that WSNS-TV has played a leadership role in developing relationships with community organizations and government, business, and civic leaders. Video points to examples of WSNS-TV's public service activities, especially in response to natural disasters, and to the station's meritorious fundraising efforts. Video asserts that, in determining WSNS-TV's likely value to the community, it is only realistic to take into account WSNS-TV's post-term performance in view of the doubtful predictive value of Video's brief, abandoned experiment in STV programming.[9]

16. Video's argument, however, is inconsistent with well established Commission policy. The Commission has long declined to give credit for a licensee's post-term upgrading. We have held that it would undermine licensee accountability to permit a licensee to evade the consequences of its deficient performance by upgrading after a challenge had been filed. *Alabama Educational Television Commission*, 50 FCC 2d 461, 476 ¶¶ 28-29 (1975); *RKO General, Inc.*, 35 FCC 2d 100, 103 ¶ 9 (1972); *Comparative Hearings on Renewal Applicants*, 22 FCC 2d 424, 427 (1970), *vacated on other grounds sub nom. Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972). As we have explained:

> . . . [T]he renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he upgrades his operation, no evidence of such upgrading will be accepted or may be relied upon. To give weight to such belated efforts to meet his obligation to provide substantial service would undermine the policy of the competitive spur which Congress wisely included in the Communications Act. A renewal applicant could simply supply minimal service from year to year, secure in the knowledge that even if a competing application were filed at the time of renewal, he could then upgrade to show substantial service. . . .

22 FCC 2d at 427. In this very case, the Court of Appeals expressed a similar view:

> We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of license. The licensee, having been given the chance and having failed, should be through. . . .

447 F.2d at 1213.

17. That policy clearly applies here, and Video's post-term record, the merit of which we do not question, is simply irrelevant.[10] Thus, as we explained in paragraph 7 above, the policy underlying the granting of a renewal expectancy is that, for the renewal expectancy to function as an incentive, the licensee must comply with applicable standards during the time period under review. If the licensee could escape the consequences of its failure to earn a renewal expectancy by upgrading after its performance had been challenged, the renewal expectancy determination (and, indeed, the congressionally-mandated comparative renewal process, as interpreted by the courts) would be rendered meaningless. In any event, termination of service by Video will not result in channel 44 going dark, since Monroe will provide a replacement service. Indeed, in an amendment filed December 21, 1982 -- before Video adopted a Spanish language format -- Monroe proposed to serve primarily the Hispanic community of Chicago and surrounding communities. Monroe proposed to present Spanish-language and English-language programming directed to the needs and interests of the Spanish-speaking people of those communities. Amendment to Application (File No. BPCT-821101KH) filed December 21, 1982 at 1-2.

IV. NONRENEWAL

18. In light of Video's failure to earn a renewal expectancy, the Commission found that Monroe's advantages for integration and diversification were decisive. Thus, the Commission granted Monroe's application and denied Video's. Nonetheless, Video argues that its license should be renewed despite the lack of a renewal expectancy. According to Video, nonrenewal represents an overly harsh "sanction" for any deficiencies stemming from its brief, unsuccessful experiment with STV operation. Additionally, Video asserts that the harm to the community that would result from termination of its service militates against nonrenewal.

19. Nonrenewal, however, is the inevitable consequence of Video's failure to earn a renewal expectancy and to prevail under the comparative analysis against Monroe. The comparative renewal process permits challengers, such as Monroe, to demonstrate their superior entitlement to the incumbent's broadcast facilities based on consideration of the incumbent's past record and other comparative factors. *Citizens Communications Center v. FCC*, 447 F.2d at 1211-13. When a challenger prevails under this system, which is mandated by an act of Congress and judicial interpretation, nonrenewal of the incumbent is the unavoidable result. Here, Monroe has diligently prosecuted its application and has earned the right to have its application granted in accordance with law.

V. ORDERS

20. ACCORDINGLY IT IS ORDERED, That the motions for leave to file amicus briefs associated with the filings listed in note 9 ARE GRANTED and the various submissions listed in note 9 ARE ACCEPTED as amicus briefs.[11]

21. IT IS FURTHER ORDERED, That, since oral argument would not assist the Commission's deliberations in this case, the Request for Oral Argument filed December 24, 1990 by Video 44 IS DENIED.

22. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed November 30, 1990 by Video 44 IS DENIED.

23. IT IS FURTHER ORDERED, That the Petition for Expedited Resolution filed December 10, 1990 by Monroe Communications Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The court also directed the Commission to reexamine allegations that WSNS-TV had carried obscene programming. That issue became moot, however, when the Commission denied renewal on comparative grounds.

[2] In the STV mode, the signal is scrambled so that only paying subscribers supplied with a decoder can receive the programming.

[3] Before the Commission are: (1) a Petition for Reconsideration filed November 30, 1990 by Video, (2) oppositions filed December 10, 1990 by Monroe and the Mass Media Bureau, (3) a reply filed December 17, 1990 by Video, (4) a Petition for Expedited Resolution filed December 10, 1990 by Monroe, (5) comments [on the petition for expedited resolution] filed December 14, 1990 by Video, (6) a Request for Oral Argument filed December 24, 1990 by Video, and (7) oppositions filed January 4, 1991 by Monroe and the Bureau.

[4] Accordingly, this case differs from cases in which the necessity of correcting a legal error dictated the outcome of the case. For example, in *Manhattan General Equipment Co. v. CIR*, 297 U.S. 129, 135 (1936), the Court required the Commissioner of Internal Revenue to apply a newly amended treasury regulation to a transaction that occurred while a prior regulation, deemed to be inconsistent with the relevant statute, was in force.

[5] Despite Video's claim that its programming was substantial under a traditional broadcast standard, Video continues to argue that it should be given special treatment because of its STV format. Video accuses the Commission of ignoring the risky, experimental nature of STV as a basis for taking a more lenient view of WSNS-TV's performance. Video asserts that the court's remand does not preclude the Commission from relying on this factor. The Commission, however, in its original order granting Video's application sought to take into account the risky nature of STV in determining Video's entitlement to a renewal expectancy. 4 FCC Rcd at 1212 ¶ 28. Nonetheless, the court faulted the Commission for not focusing on the decline in WSNS-TV's performance as indicated by its nonentertainment programming. 900 F.2d at 355-56.

[6] Video argues that its performance compared favorably with other STV-formatted stations and some conventional stations. We have, however, emphasized that there was no special standard for STV formatted stations, as opposed to conventional television stations, prior to 1987. *See* 5 FCC Rcd at 6386 n.4. The conventional stations that Video refers to (Petition for Reconsideration n.14.) are radio stations, not television stations. If WSNS-TV's nonentertainment programming is to be considered substantial, it must compare favorably to other television stations, which typically carry significant amounts of nonentertainment programming. *See, e.g., Commercial TV Stations*, 98 FCC 2d 1076, 1080-81 ¶¶ 10-11 (1984).

[7] For example, Video now seeks for the first time to characterize a program called *aerobicise* as responsive to problems involving health, welfare, poverty, and the elderly. Petition for Reconsideration, Affidavit of Alan Silverman, Exh. 3.

[8] *Video 44*, 102 FCC 2d 419 (I.D. 1985).

[9] Several filings by nonparties also address the merit of WSNS-TV's post-term programming. These are: (1) amicus briefs filed November 9, 1990 by Robert L. Krit, November 30, 1990 by the City of Chicago, by Telemundo Group, Inc., by Chicago Educational Television Association, and December 3, 1990 by the Latino Committee on the Media, by then-Governor James R. Thompson, by Axel Feller, M.D., and by Armando Susmano, M.D.; (2) a statement filed November 30, 1990 by the Coalition in Defense of Access to Channel 44; (3) letters filed November 30, 1990 written by Alejandro Carillo Castro, Consul General, by Rep. Peter J. Visclosky, by Local Union 1011, United Steelworkers of America, and by Joseph Cardinal Bernardin, Archbishop of Chicago, December 3, 1990 written by numerous individuals, December 20, 1990 written by Bishop Placido Rodriguez, and April 30, 1991 written by Rep. Dan Rostenkowski; and (4) petitions filed December 3, 1990. Monroe filed an opposition to these submissions on December 10, 1990, the City of Chicago filed comments on December 14, 1990, and the Latino Committee on the Media filed a reply on December

17, 1990. We will accept these filings as amicus submissions. Paragraph 18, below. As will be seen, however, the matters raised by these pleadings are not of decisional significance.

[10] In *Alabama Educational Television Commission*, 50 FCC 2d at 476 ¶ 30, the Commission noted that evidence of improved post-term performance indicating corrective action may be taken into account in a noncomparative case not involving serious misconduct. Because this is a comparative case, *Alabama* is inapposite here.

[11] *See Cowles Broadcasting, Inc.*, 86 FCC 2d at 1018-19 ¶¶ 75-77.

Dissenting Statement of Commissioner James H. Quello
In re Applications of Harriscope of Chicago, Inc., MM Docket No. 83-575

Today's decision represents the triumph of the administrative process over reality.

In denying renewal to Video 44, licensee of WSNS, the Commission decides to ignore six years of exceptional broadcast service to the citizens of Chicago and relies instead on a prediction, based on a limited STV-format experiment, of what the licensee's behavior might have been during this period. Even without actual experience as a comparative benchmark, it is difficult to lend much credence to the Commission's forecast, grounded as it is on a decade-old record covering the station's operation under a different format. This decision violates FDR's admonition that administrative agencies should seek to promote "substantial justice" over "technical legalism." Indeed, this is technical legalism run amok, and I therefore dissent.[1]

The Court of Appeals remanded this case to us because it concluded that the Commission's renewal expectancy analysis was insufficiently precise to monitor Video 44's performance. *Monroe Communications Corp. v. FCC*, 900 F.2d 351, 355-56 (D.C. Cir. 1990). But the Court was not without reservations about the relevant administrative practice. As Judge Silberman noted in his concurring opinion:

> It appears to me that virtually *all* the factors upon which the FCC relies in awarding or renewing broadcast licenses are in a sense fictitious; they are not really predictive of programming substance. Nor is it apparent to me that it is possible to articulate a public interest in any particular kind of programming (such as 'nonentertainment'). When I sit down on these cases, therefore, I feel somewhat like Alice in Wonderland. We have no alternative as a reviewing court, however, but to treat the FCC's elaboration of the public interest as if it made sense and therefore to insist on a consistent application of what we may really think are fanciful factors.

Id. at 359 (Silberman, J., concurring) (emphasis in original). Although I would not go as far as Judge Silberman in criticizing our processes, I half expect to see a Cheshire Cat lurking around the corridors when I am called upon to ignore a broadcaster's record to the extent done here.

It must be kept in mind that the ultimate purpose behind our analysis of a broadcaster's record for purposes of the renewal expectancy is to assess that licensee's probable future performance. *Id.* at 353, 355-56; *Central Florida*

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[1] I concurred in the Commission's decision following the remand of this case, reasoning that "[o]nce we focus on [the latter] period in the license term, as the Court says we must, it is hard to justify a renewal expectancy." *Video 44*, 5 FCC Rcd. 6383, 6386 (1990) (concurring statement). However, the issue of reviewing Video 44's post-term performance was not before the Court, and we did not consider it until this reconsideration proceeding.

Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983) ("*Central Florida II*"); *Central Florida Enterprises v. FCC*, 598 F.2d 37, 55 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979) ("*Central Florida I*"); *In re Simon Geller*, 90 F.C.C.2d 250 (1982), *rev'd on other grounds sub nom. Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984). Indeed, the very point of the remand in this proceeding was that the Commission did not derive the most accurate prediction possible. Thus, the Court faulted the Commission for not focusing on "the station's most recent performance [which is] most probative" particularly where the licensee "has instituted a dramatic and permanent format change." *Monroe Communications Corp.*, 900 F.2d at 355.

Of course, the most ironic feature of today's decision is that to reach our best estimate of Video's likely future behavior, the Commission must disregard "the station's most recent performance" as well as "a dramatic and permanent format change." In other words, the Commission has seen the future and has chosen to ignore it.

Absent from the Commission's decision is any acknowledgement that on July 1, 1985, WSNS became the first and only all-Spanish broadcasting station serving the Chicago area. Within a very brief time, the station began providing exemplary service to the Hispanic community. As the City Council of Chicago expressed it in a resolution adopted on November 7, 1990, "[o]nly weeks after becoming Chicago's first full time [Spanish-language] TV station, Channel 44 surprised the city with its brilliant handling of the relief efforts on behalf of the victims of the earthquake that destroyed Mexico City in September 1985." The resolution also noted that "Channel 44 has been the main means of mass communication involved with and devoted to the nonpartisan civic and political education of Hispanics in the City of Chicago" and concluded that WSNS "has distinguished itself in the public service of the Hispanic community and of all citizens of the city as Chicago's only full time Spanish television station."[2]

Since 1985, WSNS has aired prime time programs, public service announcements, and daily news directed toward educating the Hispanic community. It also has produced original weekly programs designed to inform the Hispanic community on issues such as education and school reform, immigration and naturalization, the 1990 Census, political coverage and voter registration, health issues and other matters of local concern. Between 18 and 20 percent of the station's airtime has been devoted to non-entertainment programming, including both general and specialized news and public affairs series.[3] Ninety-two percent of Hispanic

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[2]The Commission implies that Video 44 opportunistically switched to a Spanish language format because it faced the prospect of nonrenewal. *Memorandum Opinion and Order* ¶ 15. It does not attempt to explain, however, why the licensee would do so knowing that the Commission does not normally consider post-term behavior, nor does it account for the level of excellence attained on WSNS. It is undoubtedly no coincidence that every other STV operator in the United States also abandoned that format.

[3]*See Brief for Latino Committee on the Media as Amicus Curiae in Support of Video 44's Petition for Reconsideration* at 3-8.

households in Chicago tune into WSNS in a typical week, and the average Hispanic adult tunes into the station thirty hours per week.[4]

The outpouring of support from the community for renewal of Video 44 is even more impressive. *See United Broadcasting Company*, 100 F.C.C.2d 1574, 1581 (1985) (testimony of community witnesses shows station's responsiveness to community needs). The Coalition in Defense of Access to Channel 44 (a Chicago area organization comprised of 112 organizations or businesses and 31 individuals), the Telemundo Group, the Chicago Educational Television Association, the Latino Committee on the Media, the Governor and General Assembly of Illinois, the City of Chicago, the Archbishop of Chicago, Bishop Placido Rodriguez and the Consul General of Mexico in the City of Chicago have filed petitions supporting renewal of Video 44. In addition, petitions with more that 57,000 individual signatures have been submitted to the Commission.[5]

It should be obvious to the Commission that public preferences such as these have some bearing on the public interest. Yet if there is any doubt about how this input relates to the renewal expectancy, the Court in *Central Florida II* stressed that our guiding principle in awarding such expectancies must be "the interests of the listening public" and not "the factors themselves" in the Commission analysis "nor some other secondary and artificial construct." 683 F.2d at 510.

Contrary to the Court's directive, the Commission in this proceeding expressly ignores the public's expression of its interest in order to serve an artificial construct. To consider such evidence, according to the majority, "is inconsistent with well established Commission policy." *Memorandum Opinion and Order* ¶ 16. This recitation of policy is technically correct, and generally it is sound policy. As the majority points out, "for the renewal expectancy to function as an incentive, the licensee must comply with the applicable standards during the time period under review." *Id.* The Commission has noted previously, "if we *routinely* allowed evidence of 'upgrading' to save broadcast licenses that would otherwise not be renewed, we would expect to find potential competitors for the frequency hesitant to file a competing application." *Alabama Educational Television Commission*, 50 F.C.C.2d 461, 476 (1975) (emphasis added).

I agree with this reasoning in the routine case. But the matter before us is far from routine. Certainly the Commission has the ability to consider post-term behavior of the licensee in circumstances were it is clear that such review is in the public interest and where it would not otherwise undermine our licensing policies. The Court of Appeals has noted that "[t]he Commission should have the discretion to experiment and even to take calculated risks on renewals where licensee confesses the error of its ways." *Office of Communication of the United Church of Christ*, 359 F.2d 994, 1008 n. 28 (D.C. Cir. 1966). Similarly, the Commission has acknowledged that "[e]vidence of improved performance may in some circumstances be advanced by

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[4] *Id.* at 7.

[5] *See generally Memorandum Opinion and Order* at n.9. A number of other organizations and individuals also submitted petitions.

a renewal applicant as evidence of his willingness to correct deficient license term performance." *Alabama Educational Television Commission*, 50 F.C.C.2d at 476.[6]

The majority's aversion to such an exercise of Commission discretion is puzzling given its flexibility toward other aspects of the comparative hearing process. For example, the Commission initially adopted a very liberal third-party settlement policy, which permitted strangers to a Commission proceeding to obtain a license by settling with (*i.e.*, paying off) those who had filed applications pursuant to our rules. *Rebecca Radio of Marco*, 4 FCC Rcd. 830 (1989). I dissented from that decision, arguing that it undermined our licensing procedures and amounted to a *de facto* auction of broadcast frequencies. Eventually, the Commission agreed. *Rebecca Radio of Marco* (*Memorandum Opinion and Order*), 5 FCC Rcd. 937 (1990). Yet in a subsequent case, the Commission found that, in certain limited circumstances, third party settlements could be allowed without thwarting our licensing scheme. *See James U. Steele*, 5 FCC Rcd. 4121 (1990). The reasoning in *Steele* still is more permissive toward third party settlements than I can accept, but I agreed with the ultimate conclusion that in the limited circumstances of that case, allowing such a settlement would not undermine our comparative licensing process. *Id.* at 4122 (concurring statement of Commissioner James H. Quello).

Given this broader context, I think the Commission should consider being somewhat more flexible in its analysis of the renewal expectancy. Video 44's most recent experience and the overwhelming public response makes clear that the post-term performance is more predictive of how WSNS will operate if the license is renewed. The majority does not dispute this point. It simply concludes that if the Commission allows evidence of Video 44's post-term performance, "the congressionally-mandated comparative renewal process . . . would be rendered meaningless." *Memorandum Opinion and Order* at ¶ 16. I simply cannot agree.

Where a licensee has adopted a totally different format after experimenting with what eventually was classified as a nonbroadcast service; where all licensees ultimately abandoned the nonbroadcast service in question; where the licensee has since had an exemplary record and has substantially furthered the goal of programming diversity;[7] and where the Commission's renewal expectancy "prediction" is based on decade-old evidence, I do not think we do violence to the comparative hearing process by taking a peek at the licensee's post-term record. In other words, if this ain't a purple cow, no such animal exists.

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[6]The majority suggests that this dictum from *Alabama Educational Television Commission* is limited to the noncomparative renewal context. Yet there is no indication in that case that the Commission imposed the same limits on its reasoning. Indeed, that decision reaffirmed the general "no upgrade" policy because of its ramifications for "potential competitors." 50 F.C.C.2d at 476. Consequently, I believe that the Commission may consider post-term performance in an appropriate case whether or not renewal is comparative. *See generally National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1212 (D.C. Cir. 1984) (FCC has a responsibility to "reexamine its initial decision when the verdict which the future returns on the agency's predictions substantially undermines the basis of the initial decision.").

[7]*See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

Of course, this analysis does not completely resolve the proceeding before us. Even if granted a renewal expectancy, Video 44 would have to go through a renewal hearing. But unlike the majority, I would give the licensee its day in court.

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: Applications of Harriscope of Chicago, Inc. MM Docket No. 83-575

This case has been particularly troubling for me. The trouble arises in the need to balance regulatory and legal requirements against what the viewing public may desire. I vote with the majority out of recognition of the legal requirements of the Act, our renewal process and acknowledgement of the Court of Appeals admonitions.[1] I concur out of a desire to make clear that absent these restraints, I would strongly support renewal of this station's operations.

Video 44, licensee of WSNS-TV, currently provides the public with meritorious programming. The numerous letters from the public and elected officials throughout the state have attested to the level of service provided by WSNS-TV.[2] Since its renewal term, WSNS-TV has become Chicago's first and only all-Spanish language broadcasting station. It has provided exemplary service to the community, including airing news, public affairs programming, and political and civic programming. In fact, the station was acknowledged by the City Council of Chicago for its programming excellence and service to the community in general and in particular to Spanish-speaking residents.

Unfortunately, our existing comparative renewal process does not allow for the consideration of post-renewal term accomplishments. In order for the renewal expectancy preference to work as an incentive, the Commission has determined that it must be awarded for service within the license renewal period.[3] WSNS-TV's renewal term was from 1979-1982. During the latter part of the term, the Commission found that Video 44 transformed WSNS-TV's programming from a broadcasting to a Subscription Television (STV) format.[4] WSNS-TV gradually reduced its non-entertainment programming in connection with its conversion to an STV format. By diminishing the amount of its non-entertainment programming, WSNS-TV failed to satisfy the primary elements for renewal expectancy.

In compliance with the Court of Appeals remand, the Commission focused its review on the latter part of WSNS-TV's renewal term. The reduced quantity of non-entertainment programming and the elimination of all the news and local programming led the Commission to deny grant of a renewal expectancy for WSNS-TV. Based primarily on this lack of a renewal expectancy, the Commission awarded the license to Monroe Communications Corporation, the competing applicant.

Reluctantly, I must agree with the action taken herein. Fortunately, the Spanish-speaking population of Chicago will not be left without a station. Monroe Communications has committed itself to maintaining a Spanish language format. I can only hope that it will provide service equalling or surpassing the performance of its predecessor.

FOOTNOTES TO THE STATEMENT

[1] *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990) *remanding, Video 44*, 4 FCC Rcd 1209 (1989).

[2] *See generally Memorandum Opinion and Order*, MM Docket No. 83-575, para 16 at n. 9, adopted July 23, 1991.

[3] *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084; *Monroe Communications Corp.*, 900 F. 2d at 355-356.

[4] In the STV mode, the signal is scrambled so that only paying subscribers supplied with a decoder can receive the programming.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-581

In re Applications of

COMPASS ROSE COMMUNICATIONS CORP. File No. BPCT-880610KG

MARICOPA COMMUNITY TELEVISION PROJECT File No. BPCT-880802KF

Gregory R. Brooks d/b/a BROOKS BROADCASTING File No. BPCT-880802KI

For Construction Permit for
New TV Station, Channel 61,
Phoenix, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1991; Released: August 20, 1991

By the Commission:

1. By *Hearing Designation Order*, 4 FCC Rcd 800 (1989), the Mass Media Bureau designated for hearing the above-captioned applications for a new television station on channel 61 in Phoenix, Arizona. In an Initial Decision, ALJ Edward J. Kuhlmann found that Maricopa Community Television Project (Maricopa) was not financially qualified, and preferred Brooks Broadcasting (Brooks) over Compass Rose Communications Corp. (Compass Rose) on comparative grounds. *Compass Rose Communications Corp.*, 5 FCC Rcd 5432 (ALJ 1990).

2. All three applicants filed exceptions to the initial decision. While its exceptions were pending before the Review Board, Brooks learned that its transmitter site was no longer available, advised the Board of that loss, and sought to amend to a new site. Citing the unavailability of its original site, which was also specified by both Maricopa and Compass Rose, Brooks also filed a motion seeking the dismissal of their applications for lack of a transmitter site.

3. In a Decision, released March 12, 1991, the Board granted Brooks' motion to dismiss with respect to Compass Rose's application, upheld the ALJ's disqualification of Maricopa on the financial issue without considering Brooks' motion to dismiss Maricopa's application, accepted Brooks' site amendment, and granted its amended application. *Compass Rose Communications Corp.*, 6 FCC Rcd 1518 (Rev. Bd. 1991). Maricopa has filed an Application for Review of the Board's decision, and Brooks has renewed its request to dismiss Maricopa's application for lack of a transmitter site. Compass Rose has not filed an Application for Review. The Board's dismissal of its application is therefore final.

4. Having reviewed the pleadings before us,[1] we agree with the Review Board that Maricopa is not financially qualified under current Commission precedent (6 FCC Rcd at 1518 ¶ 3).[2] As set forth below, we will not relax our financial or comparative policies because Maricopa is controlled by low- and middle-income persons. We therefore deny Maricopa's Application for Review and dismiss as moot Maricopa's Petition for Leave to Amend to a new transmitter site and Brooks' Second Motion to Dismiss Maricopa's application for lack of a transmitter site.

5. Maricopa urges, first, that we adapt our financial requirements to accommodate low- and middle-income applicants, who may lack access to traditional funding sources; and second, that we award diversification preferences to such applicants. However, there is no precedent for special consideration based on income, and we are not persuaded by the facts and circumstances of this case to exercise our discretion to adopt such a policy here.[3] The Commission, motivated in part by its "desire . . . to ease [the] barriers of entry for minorities and others," significantly liberalized the financial test for all television applicants, shortening to three months the previous one-year requirement for construction and initial operating costs without revenues.[4] Recognizing the need for a minimum level of funding to allow immediate construction and operation, the Commission refused to exempt minority applicants from that standard,[5] and Maricopa offers no compelling public interest rationale to further modify the already modest financial standard for low- and middle-income applicants. Thus, even those groups, such as women and minorities, that may be eligible for enhanced integration credit under our comparative criteria must nevertheless comply with all other basic and comparative requirements. In addition, such enhancement credit is considered under integration rather than diversification,[6] and it has not been extended to low- and middle-income applicants. *Julia S. Zozaya*, 5 FCC Rcd 6607, 6608 ¶ 7 (1990), recon. denied, FCC 91-210, released July 19, 1991.

6. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) of the Commission's rules, the Application for Review, filed on April 10, 1991, by Maricopa Community Television Project IS DENIED; and that the following pleadings ARE DISMISSED as moot: (a) Second Motion to Dismiss, filed on April 24, 1991, by Brooks Broadcasting; and (b) Petition for Leave to Amend, filed on May 23, 1991 and supplemented on July 1, 1991, by Maricopa Community Television Project.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now before the Commission are: (a) an Application for Review, filed April 10, 1991, by Maricopa Community Television Project; (b) an Opposition, filed April 24, 1991, by Brooks Broadcasting; (c) Second Motion to Dismiss, filed April 24, 1991, by Brooks Broadcasting; (d) Opposition to Second Motion to Dismiss, filed May 23, 1991, by Maricopa; (e) Supplement to Opposition, filed July 1, 1991, by Maricopa; (f) Reply to Opposi-

tion to Second Motion to Dismiss, filed June 5, 1991, by Brooks Broadcasting; and (g) Opposition to Supplements of Maricopa, filed July 10, 1991, by Brooks Broadcasting. Also before the Commission are: (a) a Petition for Leave to Amend, filed May 23, 1991, by Maricopa; (b) Oppositions, filed June 4, 1991, by Mass Media Bureau and by Brooks Broadcasting and a Supplement to Opposition, filed June 17, 1991, by Brooks Broadcasting; (c) Supplement to Petition for Leave to Amend, filed July 1, 1991, by Maricopa; and (d) Opposition to Supplements of Maricopa, filed July 10, 1991, by Brooks Broadcasting.

[2] As we uphold Maricopa's disqualification, Maricopa's various contentions regarding our policies for awarding comparative credit for integration of ownership and management have no decisional significance.

[3] Maricopa relies on *KQED, Inc.*, 3 FCC Rcd 2821, 2830-31 ¶ 41 (Rev. Bd. 1988), review denied, 5 FCC Rcd 1784, 1785 ¶¶ 8-10 (1990), recon. denied, 6 FCC Rcd 625 (1991), to support its argument that the reasonable assurance standard is not appropriate in all cases. However, a modified standard was used in that case because noncommercial stations have access to funding sources that are not available to commercial stations. Here, Maricopa seeks authorization to operate a commercial station, and it offers no fiscal basis for an exception to the standard applicable for all other commercial applicants.

[4] *Television Applicants, Financial Qualifications*, 72 FCC 2d 784 (1979), citing *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965).

[5] *Petition for Issuance of Policy Statement or Notice of Inquiry by the National Telecommunications and Information Administration*, 69 FCC 2d 1591, 1598-99 ¶¶ 14-16 & n.14 (1978).

[6] *See WPIX, Inc.*, 68 FCC 2d 381 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-221

In the Matter of

Review of the Policy Implications
of the Changing Video Marketplace

NOTICE OF INQUIRY

Adopted: July 11, 1991; Released: August 7, 1991

Comment Date: October 22, 1991
Reply Comment Date: November 21, 1991

By the Commission: Commissioners Quello, Barrett, and Duggan issuing separate statements.

1. We initiate this proceeding in order to seek wide-ranging comments on changes in the state of the video marketplace and the public policy implications that flow from these changes. This inquiry is prompted by our general concern that some of our television rules and policies may no longer be in step with current industry circumstances and, more particularly, by a number of apparent trends described in a recent Office of Plans and Policy (OPP) staff working paper on the status of the video marketplace.[1]

2. We focus our inquiry on the implications of the findings of the OPP paper, including: 1) the increasing competition in, and fragmentation of, the video marketplace; 2) technological advances such as digital signal compression techniques; 3) the ability of some competitors to rely on revenue from direct viewer payment instead of, or in addition to, advertising; and 4) the rapid increase in the availability of national sources of programming. We believe that these changes have significant implications for core Commission goals such as localism, diversity, nationwide availability of service, and the public interest standard for broadcasters. We seek general comments concerning the staff's findings and analysis about trends and changes in the video marketplace. If commenters disagree with respect to the conclusions and projections of the staff study, we request that they offer specific evidence to support alternative conclusions. If commenters agree, we request that they provide specific evidence and analysis supporting their position and the relevant policy implications. We also ask commenters to address what steps, if any, we should take to ensure that our policies and rules continue to promote the Commission's goals of localism, diversity, nationwide availability, and broadcasting in the public interest.

INCREASING COMPETITION IN, AND FRAGMENTATION OF, THE VIDEO MARKETPLACE

3. At the outset, we note that television broadcasting now exists in an environment significantly more competitive than in years past and likely to be even more competitive in the years ahead. The statistics in this regard are well known. In 1975, the U.S. had three commercial broadcast networks and no cable networks; cable television was largely a broadcast retransmission medium. By 1990, there were over 100 national and regional cable networks and a major new broadcast network was developing. Cable subscribership rose from 17 percent of television households in 1975 to over 56 percent in 1990; cable now passes over 90 percent of television households. The number of broadcast stations increased by 50 percent over that 15 year period, with independent stations accounting for over three-fourths of that growth. The number of off air stations available to the median household increased from six in 1975 to ten in 1990, and by 1990, 94 percent of television households were located in markets with five or more television stations. In 1975, home videocassette recorders (VCRs) were rare and there were no home satellite dish systems; in 1990, 69 percent of television households owned VCRs and three percent had home satellite dishes.

4. This expansion in the availability of outlets and programming has markedly reduced the audience shares of the broadcast networks and their affiliates. The percentages of prime time viewing of the three major networks dropped from 73 percent in 1982-83 to 58 percent in 1989-90;[2] viewing of cable-originated programming rose from 10 to 20 percent in that period. While each broadcast network still retains a prime time audience share roughly equal to that of all cable networks combined, it appears likely that satellite services such as direct broadcast satellite (DBS), increasingly well-financed cable programming services, and greater cable television channel capacity will perpetuate these trends of the last fifteen years into the 1990s.

5. Although regulation attempts to correct market imperfections, it also serves to further public interest goals not strictly limited to purely economic forces. These dual purposes for regulation must be balanced in any review of changing market conditions. To the extent that certain Commission regulations and policies were adopted to respond to problems created by limitations on entry and concentration of control, such regulation should reflect the amount of diversity and competition that exists and any remaining barriers to entry. Accordingly, we seek comment on the implications of the growth of competition in the video marketplace for our regulatory policies, including:

(1) What is the long-term forecast for these current trends, and any identifiable countervailing trends, in viewing choices and their implications for broadcast television?

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[1] Office of Plans and Policy Working Paper # 26. *Broadcast Television in a Multichannel Marketplace*, DA 91-817, 6 FCC Rcd 3996 (1991) ("OPP paper").

[2] *See* OPP paper, p. 28, Table 8. We also note that, while the total number of television households increased from 70 million in 1975 to 93 million in 1990, over this period the number of homes reached by the three major networks in prime time declined from 36.9 million to 32.7 million. *Id.* at p. 26, Table 7.

(2) What are the policy implications of a continued decline in the viewing shares of broadcast television networks? Are the effects of declining audience shares mitigated by the continued increase in the total number of television households?

(3) What impact will increased competition have on local broadcast stations, whether network affiliates or independents, and how will this affect their share of advertising revenues? Will increased competition for advertising revenues have an impact on their programming, including local programming?

(4) Which Commission policies and regulations, if any, hamper the ability of the networks, their affiliates, or independents to compete with multichannel delivery systems?

(5) Do our ownership rules, for example, prevent realization of economies of scale and limit program investment which might otherwise promote the vitality of local stations?

(6) To what extent should the number of competing programming choices provided by cable television and satellite services affect our broadcast multiple ownership policies, consistent with diversity and other public interest goals?

(7) If changes are proposed to the broadcast multiple ownership or crossownership rules, what effect will such proposals have on the traditional concerns for diversity embodied in the Commission's public interest mandate?

(8) To what extent, if any, might changes in ownership rules permit broadcasters to increase investments in programming that would increase diversity?

TECHNOLOGY

6. Technology and economics have combined in recent years to change the face of video distribution in the United States. The principal changes that have taken place involve expansion in the availability and channel capacity of multichannel video service providers, in particular increases in cable availability and channel capacity and the development of a market for direct-to-home satellite service. Other important developments include widespread ownership and use of home video recording and playback systems, and use of hand-held television remote control devices.

7. Other technological changes, in particular the development and refinement of digital video compression technologies, could be even more revolutionary in their consequences in the years ahead. Compression systems, which are likely to be used first in conjunction with satellite program delivery and then on cable systems, also hold the potential for increasing the channel capacity of terrestrial broadcasting systems. Dramatic increases in channel capacity will be possible through the implementation of this technology. In addition, increased use of currently available technologies, including addressability and interactivity, which allow viewers to select specific programming or send messages for transactions such as home shopping and banking, could permit enhanced service offerings.

8. With respect to these and other new technological changes, we ask:

(1) At what point will technologies with compression capabilities become a competitive factor in the marketplace? What type of market penetration is projected for such video services?

(2) Are any existing Commission technical, ownership or other regulations likely to have a negative effect on the development and widespread use of these technologies? Are there technical rules that could be modified to increase the competitiveness of broadcast television stations vis-a-vis multichannel providers?

(3) Does the combination of these ongoing technological developments plus existing Commission regulations have any positive or negative implications for the widespread availability of video service? For example, what will be the impact on broadcast television if video compression techniques are introduced first by satellite and cable systems, as expected?

(4) What are the implications, if any, of these technological changes for the diversity of video programming and editorial viewpoints?

(5) What are the implications of these technological changes for provision of locally produced or originated versus nationally produced service to viewers?

(6) To what extent will broadcast licensees, particularly those who own a single or small group of stations, be able to participate in these technological changes and enhance their local service? How do such changes implicate the Commission goal of localism embodied in Section 307(b) of the Communications Act?

(7) More generally, in what ways, if any, will these changes affect the ability of the Commission to carry out its mandate to regulate broadcasting and other ancillary services "in the public interest?"

RELIANCE ON DUAL REVENUE STREAMS

9. One of the most significant trends in the economics of video distribution in recent years is the change from advertising as virtually the sole revenue source for distributors to an environment in which a significant portion of distributors receive both advertising and direct consumer revenues. The primary example of this phenomenon, the cable industry, derives revenues from both subscription fees and advertising sales. Indeed, pay and pay-perview services derive their revenues solely from viewer payment. A satellite DBS provider would also be able to capture these dual revenue sources. The television broadcasting industry, on the other hand, has almost uniformly derived revenue solely from advertising sales, directly or through network compensation.

10. We seek comment on the implications of this development for our regulatory policies:

(1) What are the implications of increased specialization as a competitive programming strategy for the single-channel broadcaster? What practical and legal impediments would affect the ability of a broadcaster to follow a niche programming strategy?

(2) Is multichannel transmission capability or the ability to deliver a specialized program service the only means to attain dual revenue streams?

(3) What are the projections for advertising revenue growth during the next decade? Will local broadcasters experience a net growth or net loss in advertising revenue during this same period? To what extent do underlying economic conditions in the national and local market affect this analysis?

(4) To what extent would the loss of advertising revenues to competitive media services affect a broadcast licensee's ability to provide local service? To the extent local broadcast service is diminished, what are the implications for local services provided by other competitive media outlets? What are the implications for the system of local stations fostered by Commission policies and Section 307(b) of the Communications Act?

(5) Would repeal of the compulsory license for cable television and/or implementation of a scheme of retransmission consent enable local stations to compete more effectively?[3]

(6) Does viewer payment for programming affect the diversity of voices, both broadcast and non-broadcast, available in local video markets? How are broadcast viewers who do not pay directly for programming affected by the growth of pay program services? What are the implications for our current regulatory framework for over-the-air broadcasting?

CHANGES IN DISTRIBUTION AND SUPPLY OF VIDEO PROGRAMMING AT THE NATIONAL LEVEL

11. As the number of local video programming outlets has increased, so have the sources of and distributors of national television programming. As space satellite relay systems have replaced microwave routes as the principal technology for delivery of programming to local broadcast stations, programs increasingly are available nationwide rather than on a local or regional basis. Starting in 1975, programmers to the cable television industry began using satellite relay systems to deliver programming for cable use. Today satellites are used not only to relay numerous channels of video programming to cable systems within the U.S. (and around the world) but to deliver network and syndicated programming to both regular and low power television stations.

12. In terms of audience, each of the three major broadcast networks still attracts larger audiences than any other individual source. Nevertheless, the sources of supply to local video outlets are becoming increasingly competitive; new broadcast and cable networks are developing and new sources of news and syndicated programming have come into being. These developments, in conjunction with other changes in the marketplace, will affect our understanding of how the video marketplace functions and the rules and policies that should apply to the various participants. We seek to explore and obtain comment on these consequences through this proceeding.

13. In particular, we seek comment on:

(1) What changes can be anticipated in the sources and supply of video programming at the national level?

(2) To what extent will competition to broadcast television, particularly by cable networks and their cable system affiliates, change the relationships between suppliers of broadcast programming and local television broadcast stations? Will new sources of supply and competition loosen the relationship between networks and their affiliates or will it create pressure for a closer partnership between them?

OTHER ISSUES

14. In addition to comments on the changing video marketplace structure and the Commission policies and rules specifically raised in this notice, we welcome comment on any other events, policies, or rules that may be implicated by our general inquiry into the future of the video marketplace. In this regard, commenters may also wish to address whether changing the multiple ownership rules impacts any prior Commission decisions that deleted or modified rules or policies which were based upon the principles of diversity, localism, or the number of broadcast television outlets in the market.

PROCEDURAL MATTERS

A. Ex Parte Rules - Exempt Proceeding

15. This proceeding is exempt from the *ex parte* requirements pursuant to 47 C.F.R. § 1.1204(a)(4).

B. Comment Dates

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before October 22, 1991, and reply comments on or before November 21, 1991. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

C. Additional Information

[3] The related issue of must carry is the subject of the *Report and Order and Second Further Notice of Proposed Rule Making* in MM Docket Nos. 90-4 and 84-1296, FCC 91-184, 56 FR 33387, 33414 (July 22, 1991).

For additional information on this proceeding, contact Beverly McKittrick, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

STATEMENT OF COMMISSIONER JAMES H. QUELLO ON REVIEW OF THE POLICY IMPLICATIONS OF THE CHANGING VIDEO MARKETPLACE

They say that in life timing is everything, and I think it is a particularly appropriate time right now to take a comprehensive look at our policies relating to television. The video marketplace is going through changes as significant as any in its history, and it is incumbent upon the Commission, as the expert agency, to monitor these changes and adjust its policies accordingly.

First, I want to congratulate the staff of the Office of Plans and Policy for their most impressive effort in producing a thought-provoking study on which many of the NOI questions are based. This study is an excellent starting point for our inquiry.

I want to emphasize, however, that the study is just that — a starting point. It has not yet been adopted by the Commission or tested by the adversarial give and take that we expect from the commenters in this proceeding. Consequently, any interpretations in the popular press about the FCC predicting the demise of broadcasting are more than a little premature. We are just beginning the inquiry.

But you don't have to predict the end of broadcasting as we know it to understand that some of our rules no longer relate to the reality of the video marketplace. I believe I made my feelings on this point clear in my dissenting statement in the financial interest and syndication rules proceeding. *Evaluation of the Syndication and Financial Interest Rules*, FCC 91-114 (released May 29, 1991) (dissenting statement). The finsyn rules were adopted during a time of near-absolute network dominance — a fact that has changed drastically during the intervening two decades. In my mind, there can be no justification for retaining rules long after their policy purposes have vanished, especially if the rules hamper the viability of a competitor in the video marketplace. In particular, I think it is time to review the effect of cross-ownership rules on free over-the-air television.

In this regard, the present inquiry presents a much needed opportunity to look at a broad range of policies to determine which ones are still needed, which ones are not, and which ones are counterproductive in terms of the public interest. I am looking forward to reading the comments in this most important proceeding.

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: REVIEW OF THE POLICY IMPLICATIONS OF THE CHANGING VIDEO MARKETPLACE

I look forward to reviewing the comments which will be filed in response to issues raised in this Notice of Inquiry. As I have stated before with respect to our radio "attic to basement" review, periodically the Commission should examine its rules to ensure that they comport with marketplace realities. However, I wish to emphasize, that such reviews must be taken in a balanced manner. In the media area, I believe our regulations exist not only to address market imbalances, but also to address public interest concerns that may or may not be in the best economic self-interest of broadcast licensees. These dual purposes for regulation in the media area should be addressed when analyzing changing market conditions. To the extent that certain Commission regulations and policies were adopted to respond to problems of limitation on entry or concentration of control, I believe such regulations should continue to bear some relationship to: (1) the amount of competition that exists; (2) the remaining barriers to entry; and, (3) the relative diversification of control within segments of the marketplace. To the extent certain Commission regulations were adopted to respond to overarching public interest concerns, I believe that a review of changing market conditions or technologies must also address the implications for these concerns.

In this Notice of Inquiry, I encourage industry members, trade associations, and public interest groups to address the implications of changing technologies on the future of local broadcast stations. I particularly look forward to reviewing comments with respect to the implications of any proposed multiple ownership rule changes on our traditional concerns for diversity and localism. In this regard, I hope that commenters not only address the implications of such changes on traditional First Amendment or diversity concerns, but also comment on the extent to which such changes impact upon the rationale for prior Commission decisions to abolish the Fairness Doctrine or community ascertainment requirements. Finally, I look forward to comments from those who own a single station or a small group of stations as to their ability to participate in future technological and economic changes projected in the OPP working paper.[1]

FOOTNOTE TO THE STATEMENT

[1] F. Setzer & J. Levy, OPP Working Paper 26, *Broadcast Television in a Multichannel Marketplace* (FCC June 1991). I also desire additional input on the economic projections provided in the OPP paper. As I have stated before, the OPP paper is one of several inputs I will look at in making any decisions in this docket.

Separate Statement
of
Commissioner Ervin S. Duggan

In Re: Notice of Inquiry -- Review of the Policy Implications of the Changing Video Marketplace

As I have said in the past, I fully support reviewing the Commission's television rules and policies in light of new realities. Such a review seems to me well-founded, in view of the Staff Working Paper produced by the Office of Plans and Policy: the most thorough recent analysis of the video marketplace.

I fervently hope that the gloomy predictions offered by this paper turn out to be wrong. If we hope to prove them wrong, however, and to shape a happier future for broadcast television, we need to remember one important fact: the fate of the broadcast industry will not be shaped at 20th and M Streets. Regulation is important, but the greatest power to shape the destiny of broadcasting is in the hands of broadcasters themselves: in their courage, their imagination, their agility, their shrewdness. It is far more important, in my judgment, that broadcasters respond vigorously to the change in the marketplace than for the FCC merely to put more stations in the hands of a few owners.

Broadcasters need to invent a whole new future. They need, as never before, to innovate: to launch a new era of research, technical innovation, and imaginative programming. Broadcasters should be creating new services and forging new alliances that will expand their channel capacity and energize their programming. Where, for example, are broadcasters when it comes to exploiting the tantalizing possibilities of interactive television?

It has become a truism that the future belongs to those who know how to produce great programming. Surely the worst thing that could happen now is for broadcasters to respond to new challenges by cutting back drastically on high quality entertainment and local programming, the very thing that has distinguished the broadcast medium in the past.

I was struck by two themes that emerged, again and again, in the recent obituaries of actor-producer Michael Landon. One was that every show he was involved with turned out to be a hit. The other was that every show he was involved with was one that parents and children could sit down and enjoy together. Perhaps this connection is no accident. What does it profit broadcasters to seek "breakthrough" concepts in programming--- if the breakthroughs are to the lowest common denominator of taste and values?

Ever since joining the Commission, I have been troubled by the asymmetry between our regulation of broadcasting and multichannel video industries. We expect broadcasters to continue serving the public interest while competing for ever more scarce advertising revenues. Broadcasters' competitors, on the other hand, are not so constrained when it comes to regulation, to revenue streams, or to channel capacity.

In light of broadcasters' long history of public service, I want to do all that I can to help broadcasters compete in the future video world. I am eager to remove old regulatory barriers, if they prove to be unnecessary. But broadcasters' ultimate fate, I am convinced, lies in their own

hands and minds. So I will be interested, as we examine what we must do for broadcasting, to see what broadcasting is doing for itself.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-549

In the Matter of

Amendment of Section 73.202(b), RM-7464
Table of Allotments,
FM Broadcast Stations.
(Joshua Tree, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1991; Released: August 20, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 1581 (1990), issued in response to a petition filed by Mel Yarmat ("petitioner") proposing the allotment of Channel 221A to Joshua Tree, California, as that community's first local aural transmission service. Petitioner filed supporting comments in response to the *Notice*. John J. Davis, President of Corinthians XIII Broadcasting Company, Inc. ("Corinthians"), licensee of Station KROR(FM), Channel 295B, Yucca Valley, California, filed opposing comments, to which petitioner responded. No other comments were received.

2. Although Corinthians acknowledges that Joshua Tree is devoid of local aural service, it adds that the community is served by its Station KROR(FM) and by Station KSES(AM), Yucca Valley, as well as by area stations KCDZ(FM), KQYN(FM) and KDHI(AM), located in nearby Twenty-nine Palms, California. While Corinthians recognizes that current Commission policy relies on the marketplace as the arbiter of the public interest, it expresses its concern that due to the stagnant area economy, the provision of an additional competitive service in the market could have a deleterious effect on the financial stability of existing stations in the area. [1]

3. Petitioner disputes Corinthians' assertions that Joshua Tree is adequately served by area stations, noting that reception service is not an acceptable substitute for localism. Moreover, petitioner claims that local estimates of population growth in Morongo Valley is approximately three times greater than that reported by Corinthians, suggesting that the addition of a new station in the marketplace would benefit the public by providing the larger population with increased amounts and diversity of program choices.

4. Based on the information presented, we believe the public interest would be served by allotting Channel 221A to Joshua Tree, as that community's first local aural transmission service. Corinthians' arguments regarding potential economic impact are not relevant to our analysis. *See Policy Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 at 641 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989).

5. As stated in the *Notice*, Channel 221A can be allotted to Joshua Tree consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 4.3 kilometers (2.7 miles) east of the community [2] to avoid short-spacing to Station KVCR(FM), Channel 220B1, San Bernardino, California. [3] Additionally, since Joshua Tree is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government to this allotment was obtained.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 4, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Joshua Tree, California	221A

7. The window period for filing applications for Channel 221A at Joshua Tree, California, will open on **October 7, 1991,** and close on **November 6, 1991**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Corinthians adds that since Joshua Tree is located in Morongo Valley (population 30,000, according to Corinthians), the five area stations serving Joshua Tree provide one radio signal per 6,000 people county-wide. Thus, Corinthians believes the addition of a new radio service in the market will further fractionalize audiences as well as revenues, resulting in an overall diminution of service to the public.

[2] Coordinates used for Channel 221A at Joshua Tree are 34-08-45 and 116-16-04.

[3] Coordinates at the licensed site of Station KVCR(FM) are 33-57-57 and 117-17-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-244

In the Matter of

Amendment of Section 73.202(b), RM-7776
Table of Allotments,
FM Broadcast Stations.
(Churubusco, Indiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 20, 1991

Comment Date: October 11, 1991
Reply Comment Date: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Robert M. Peters ("petitioner), permittee of Channel 242A, Churubusco, Indiana, requesting the substitution of Channel 242B1 for Channel 242A and modification of his construction permit (BPH-880107MH) to specify operation on the higher powered channel. Petitioner stated his intention to apply for Channel 242B1 if it is allotted to Churubusco, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 242B1 for Channel 242A at Churubusco since it could provide an enhanced service to the community. Channel 242B1 can be allotted to Churubusco at the petitioner's specified site,[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (2) of the Commission's Rules. However, since Churubusco is located within 320 kilometers (200 miles) of the Canadian border, concurrence of that government to the proposed allotment of Channel 242B1 is required.

3. Since the petitioner's modification request at Churubusco, Indiana, conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the permit of Robert M. Peters (BPH-880107MH) without entertaining competing expressions of interest in the use of Channel 242B1 at Churubusco, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
Churubusco, Indiana	242A	242B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 11, 1991,** and reply comments on or before **October 28, 1991,** and are advised to read the Appendix for the proper procedures. Comments should also be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Harry F. Cole, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W., Suite 250
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates at the petitioner's specified site for requested Channel 242B1 at Churubusco are 41-11-32 and 85-14-02.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-245

In the Matter of

Amendment of Section 73.202(b), RM-7775
Table of Allotments,
FM Broadcast Stations.
(Prairie Grove, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 20, 1991

Comment Date: October 11, 1991
Reply Comment Date: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Vinewood Communications, a Limited Partnership ("petitioner"), permittee of Station KDAB(FM), Channel 235A, Prairie Grove, Arkansas, seeking the substitution of Channel 235C2 for Channel 235A and modification of its permit accordingly to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 235C2 if it is allotted to Prairie Grove, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 235C2 for Channel 235A at Prairie Grove since it could provide an enhanced service to the community. Channel 235C2 can be allotted to Prairie Grove at the petitioner's specified site,[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. Since the petitioner's modification request at Prairie Grove, Arkansas, conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the permit of Station KDAB(FM) without entertaining competing expressions of interest in the use of Channel 235C2 at Prairie Grove, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Prairie Grove, Arkansas	235A	235C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 11, 1991,** and reply comments on or before **October 28, 1991,** and are advised to read the Appendix for the proper procedures. Comments should also be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Arthur Blooston, Esq.
Caressa L. Davison, Esq.
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W.
Washington, D.C. 20037

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates at the petitioner's specified site for requested Channel 235C2 at Prairie Grove are 35-51-00 and 94-23-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-246

In the Matter of

Amendment of Section 73.202(b), RM-7665
Table of Allotments,
FM Broadcast Stations.
(Bay Minette, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 20, 1991

Comment Date: October 11, 1991
Reply Comment Date: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Baldwin Broadcasting Company ("petitioner"), permittee of Station WFMI(FM), Channel 293A, Bay Minette, Alabama, seeking the substitution of Channel 293C3 for Channel 293A and modification of its permit accordingly to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 293C3 if it is allotted to Bay Minette, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 293C3 for Channel 293A at Bay Minette since it could provide an enhanced service to the community. Channel 293C3 can be allotted to Bay Minette at the petitioner's specified site,[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules. [2]

3. Since the petitioner's modification request at Bay Minette, Alabama, conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the permit of Station WFMI(FM) without entertaining competing expressions of interest in the use of Channel 293C3 at Bay Minette, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Bay Minette, Alabama	288A, 293A	288A, 293C3

5. IT IS ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WGUD-FM, Pascagoula, Mississippi, as follows: WGUD Stereo, Inc., P.O. Box 307, Pascagoula, MS 39568.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **October 11, 1991,** and reply comments on or before **October 28, 1991,** and are advised to read the Appendix for the proper procedures. Comments should also be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Ronald D. Maines, Esq.
Jones, Waldo, Holbrook & McDonough, P. C.
2300 M St., N.W., Suite 900
Washington, D.C. 20037

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

[1] Coordinates at the petitioner's specified site for requested Channel 293C3 at Bay Minette are 30-42-30 and 87-49-35.

[2] The proposal for Channel 293C3 at Bay Minette is short-spaced to Station WGUD-FM, Channel 292A, Pascagoula, Mississippi, at coordinates 30-26-54 and 88-33-05, and thus dependent upon Station WGUD-FM moving to Channel 290C3 in accordance with the modification provisions set forth in the *Report and Order* in MM Docket No. 86-55. *See* 4 FCC Rcd 7556 (1989). Therefore, since the Bay Minette allotment is dependent upon the grant of a license to Station WGUD-FM on the new channel, for which it has specified coordinates at 30-24-19 and 88-47-26 (see BPH-900223IC), the issuance of a license for Channel 293C3 may be withheld until the license grant occurs at Pascagoula. The licensee of Station WGUD-FM will be served with a copy of this *Order.*

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Repiy comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-247

In the Matter of

Amendment of Section 73.202(b), RM-7768
Table of Allotments,
FM Broadcast Stations.
(Clayton, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 20, 1991

Comment Date: October 11, 1991
Reply Comment Date: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Annette V. Antzes ("petitioner") requesting the allotment of Channel 300A to Clayton, Louisiana, as the community's first local FM service. Petitioner states that she will apply for the channel, if allotted.

2. Petitioner states that Clayton is an incorporated community with its own local government. In addition, petitioner notes that Clayton is listed in the U.S. Census and her proposed allotment would provide the community of 1,204 persons with their first local radio transmission service.

3. We believe the public interest would be served by proposing the allotment of Channel 300A to Clayton, Louisiana, since it could provide the community with its first local FM service. Channel 300A can be allotted to Clayton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [1]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clayton, Louisiana	--	300A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 11, 1991,** and reply comments on or before **October 28, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Annette V. Antzes
9070-C SW 22nd Street
Boca Raton, Florida 33428
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 654-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 300A at Clayton are North Latitude 31-43-18 and West Longitude 91-32-30.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-248

In the Matter of
Amendment of Section 73.202(b), RM-7778
Table of Allotments,
FM Broadcast Stations.
(Huntingdon, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 20, 1991

Comment Date: October 11, 1991
Reply Comment Date: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Milan Broadcasting Company, Inc. ("petitioner"), licensee of Station WVHR(FM), Channel 265A, Huntington, Tennessee, requesting the substitution of Channel 265C3 for Channel 265A at Huntington and modification of Station WVHR(FM)'s license to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2 We believe the public interest would be served by proposing the substitution of Channel 265C3 for Channel 265A at Huntington, since it could enable Station WVHR(FM) to expand its coverage area. Channel 265C3 can be allotted to Huntington in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) west to accommodate petitioner's desired transmitter site. [1] As requested, we also propose to modify petitioner's authorization for Station WVHR(FM) to specify operation on Channel 265C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 265C3 at Huntington or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Huntington, Tennessee	229A, 265A	229A, 265C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 11, 1991,** and reply comments on or before **October 28, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James R. Cooke, Esq.
Harris, Beach & Wilcox
Suite 1000
1611 North Kent Street
Arlington, Virginia 22209
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 654-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 265C3 at Huntington are North Latitude 36-01-00 and West Longitude 88-29-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Communications Satellite Corporation Tariff F.C.C. No. 103	Transmittal Nos. 868 and 886

ORDER

Adopted: August 9, 1991; Released: August 20, 1991

By the Deputy Chief, Common Carrier Bureau:

1. Transmittal 868, filed by Communications Satellite Corporation (Comsat) introduces non-preemptible full-period transponder lease service for high power video and "very small aperture terminal" (V-SAT) applications on a new, high-powered Ku-band satellite called INTELSAT-K. This satellite will operate in the Atlantic Ocean Region (AOR), features switching capabilities among its coverage areas in Europe and in North and South America, and is scheduled to be operational by March 1, 1992. *See* Tr. 868 Description and Justification (D&J) at Section A. Video offerings on INTELSAT-K are non-preemptible and are available in full (54 MHz) and half (27 MHz) transponder allotments. Two transponders will also be set aside for preemptible V-SAT applications. *Id.*

2. Among other things, Transmittal 868 provides for a 20 percent discount to customers who, prior to the satellite's launch, commit to lease a full transponder for five or ten years and initiate service within six months of the operational date. Tr. 868 at Section 4.5.3(C). A maximum of two 54 MHz transponders may be reserved at the prelaunch rate by a single customer. Post launch services are available for shorter lease terms, with flexible start dates, and for half transponders. *Id.*

3. Upgrades to INTELSAT-K leases by Comsat customers currently on other satellites require taking non-preemptible service, and are available only to customers with a remaining lease term of no more than two years. Tr. 868 at Section 4.5.1(E); D&J at Section D. These customers are not required by Comsat to pay termination liability charges. *Id.* at Section 4.5.1. As modified by Transmittal 886, filed July 26, 1991, customers who wish to terminate a five-or ten-year lease must pay for a minimum period of service, plus 75 percent of the remaining lease balance calculated at the higher, post launch rate. Tr. 886 at Section 4.6.1. Comsat is obliged under the tariff as modified, to take reasonable steps to find another customer. Once found, Comsat will issue a pro rata refund of the termination charges collected. *Id.* Both transmittals are scheduled to become effective on August 21, 1991.

4. Pan American Satellite (PanAmSat) filed a petition to reject, or in the alternative, suspend and investigate Transmittal 868, arguing first that the pre-launch discounts are unjustified. Alternatively, PanAmSat argues, if the Commission accepts Comsat's discounted rates, Comsat should be required to offer the rates through a separate subsidiary to ensure that Comsat's stockholders, rather than monopoly ratepayers, bear the burden of any marketplace errors made by Comsat. *Id.* at 6. Next, PanAmSat argues that limiting each customer's ability to reserve pre-launch capacity to a maximum of two 54 MHz transponders is arbitrary and amounts to a form of resale restriction. *Id.* at 8. PanAmSat also argues that Comsat has not demonstrated that its termination charges are reasonable, and alleges that several of Comsat's post launch rates for 54 MHz transponders are below its stated revenue requirement. *Id.* at 8-9.

5. Brightstar Communications Ltd. (Brightstar) filed a petition to suspend and investigate Transmittal 868. Brightstar contends that the upgrade provision in that transmittal amounts to a discriminatory restriction on the ability of some Comsat customers to migrate to the INTELSAT-K satellite. Brightstar Petition at 1. According to Brightstar, Comsat appears to favor certain of its video customers arbitrarily, to the detriment of Brightstar and others who might wish to migrate to the INTELSAT-K but who would have more than two years remaining on existing Intelsat leases. *Id* at 3. Brightstar also asserts that Comsat's termination liability formula is not justified in its rate development information. According to Brightstar, Comsat does not provide any rational basis for why the termination liability conditions for the INTELSAT-K are more strict than for other services. *Id.* at 5.

6. In reply to PanAmSat's complaint that its prelaunch rates are unjustified, Comsat maintains that the high costs of establishing a new earth station community and the higher rate levels for INTELSAT-K space segment make it unclear how quickly additional supply at a new orbital location will be accepted in the marketplace. Therefore, Comsat maintains, lower prelaunch rates are needed to attract customers who will use the satellite from the start of its operational life. Comsat Reply at 2-3. In defense of its termination liability provision, Comsat states that unlike existing transponder leases, commitments to INTELSAT for INTELSAT-K leases are irrevocable for any given term. Therefore, Comsat maintains, it is necessary for Comsat's own termination charges to be higher for INTELSAT-K leases. *Id.* at 13. Additionally, Comsat asserts, it is reasonable to take steps to ensure that a customer who takes advantage of a long-term pre-launch rate, keeps its commitments. *Id.*

7. Comsat further asserts that the upgrade provision, which requires that a customer have no more than two years remaining on a current lease in order to avoid termination liability charges, is not arbitrary. Comsat states that the two-year cut-off was selected because customers who started their leases before the INTELSAT-K procurement was considered were not on notice and could not have anticipated a future opportunity to migrate. Comsat thus permits these customers to upgrade without termination penalty. *Id.* at 14-15. Further, Comsat alleges that INTELSAT will not waive termination charges to Comsat on rollovers of existing leases. Thus, Comsat concludes, it must protect itself by recovering the costs of early termination from its customers who have long outstanding lease terms.[1] *Id.* at 15.

8. The Common Carrier Bureau has reviewed Communications Satellite Corporation Transmittal No. 868 as modified by Transmittal No. 886, the petitions filed by Pan American Satellite and Brightstar Communications, Ltd., and related pleadings. We conclude that no compel-

ling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

9. Accordingly, IT IS ORDERED that the petition to reject, or suspend and investigate filed by Pan American Satellite, and the petition to suspend and investigate filed by Brightstar Communications, Ltd., Tariff F.C.C. No. 103, Transmittal Nos. 868 and 886, ARE DENIED.

10. IT IS FURTHER ORDERED that the motion filed by Pan American Satellite to strike the reply comment filed by Brightstar Communications, Ltd. IS GRANTED and that reply comment IS STRICKEN.

11. IT IS FURTHER ORDERED that the supplemental reply filed by Communications Satellite Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTE

[1] On June 28, 1991, Brightstar filed a reply comment addressing Comsat's filing and PanAmSat's petition against it. PanAmSat filed a motion to strike Brightstar's reply comment on July 2, 1991, contending that it is an unauthorized pleading. PanAmSat Motion at 2. Brightstar filed an opposition to PanAmSat's motion to strike on July 9, 1991, and Comsat filed a supplemental reply on July 11, 1991. As PanAmSat argues in its motion, Section 1.773(b) of the Commission's Rules, 47 C.F.R. § 1.773(b), gives only the publishing carrier, in this case Comsat, the right to reply to a petition against a tariff transmittal. We find that Brightstar's June 28 reply comment is an unauthorized pleading, and therefore grant PanAmSat's motion to strike. We also dismiss Comsat's supplemental reply as an unauthorized pleading.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-424

In re Applications of

ASPEN FM, INC. File No. BPH-850712PH

AJAX MOUNTAIN BROADCASTING CORPORATION File No. BPH-850712PR

For Construction Permit for
New FM Station, Channel 296A
Aspen, Colorado

ERRATUM

Released: August 20, 1991

Aspen FM, Inc., 6 FCC 1602 (1991), is corrected as follows:

The reference at the end of paragraph 14, id. at page 1604, should read *See* n.3, *supra* rather than *See* n.2, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

John I. Riffer
Associate General Counsel
Adjudication Division
Office of General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-91-158

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in the Denmark-Germany 1 Cable System for the Provision of American Telephone and Telegraph Company's Authorized Services Between Points In or Reached Via the United States and Denmark Finland, Norway and Sweden

ORDER AND AUTHORIZATION

Adopted: August 13, 1991; Released: August 21, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-91-158 IS GRANTED and AT&T is authorized to:

a. acquire and operate half-interests in 18 Minimum Investment Units (MIUs)[1] of capacity in the Denmark-Germany 1 cable system (DK-GER 1) to extend TAT-9 capacity;

b. lease appropriate extension facilities; and

c. activate capacity in the Denmark-Germany 1 cable system and the aforementioned extension facilities for the provision of its authorized telecommunications services between the United States and Denmark (3 MIUs), Finland (3 MIUs), Norway (3 MIUs), Sweden (9 MIUs) and beyond.

2. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] A MIU is defined as a nominal 2.048 Mbit/s digital bit stream (2 Mbits/s) and consists of two half interests which are intended for use between two correspondents respectivley for joint working. AT&T will pay a sum of approximately $580,300 for 18 half-MIUs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-91-097

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate capacity in the Second Southeast Asia Mediterranean-Western Europe Cable System; the Europe-Africa Cable System; and the United Kingdom-Belgium 6 Cable System for the Provision of AT&T's Authorized Services Between Points In or Reached Via the United States and Various Countries.

ORDER AND AUTHORIZATION

Adopted: August 12, 1991; Released: August 21, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by the American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, it is hereby ordered that the application File No. I-T-C-91-097 IS GRANTED and AT&T is authorized to:

(a) acquire and operate half-interests in 900 Minimum Assignable Units of Ownership (MAUOs)[1] of capacity in the second Southeast Asia-Mediterranean-Western Europe Cable System (SEA-ME-WE 2)[2] to extend TAT-8 and TAT-9 capacity;

(b) acquire and operate half-interests in 120 MAUOs of capacity in the Europe-Africa Cable System (EURAFRICA) [3] to extend TAT-8 and TAT-9 capacity;

(c) acquire and operate half-interests in 12 Minimum Investment Units (MIUs)[4] of capacity in the United Kingdom-Belgium 6 Cable System (UK-BEL 6)[5] to extend TAT-8 and TAT-9 capacity;

(d) acquire on a lease basis and operate appropriate extension facilities; and

(e) activate capacity in the aforementioned cables and extension facilities for the provision of its authorized telecommunications services between the U.S. and those countries listed in Attachment A.

2. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

COUNTRIES SERVED BY THE SEA-ME-WE 2 EURAFRICA AND UK-BELGIUM 6 CABLE SYSTEMS

SEA-ME-WE 2	
U.S. TO: (in MAUOs)	
Cyprus	(30)
Djibouti	(15)
Egypt	(60)
India	(480)
Indonesia	(60)
Saudi Arabia	(90)
Sri Lanka	(60)
Syria	(30)
Turkey	(60)
Yemen	(15)
EURAFRICA	
U.S. TO: (in MAUOs)	
Portugal	(90)
Morocco	(30)
UK-Belgium 6	
U.S. TO: (in MIUs)	
Belgium	(3)
Germany	(3)
Switzerland	(6)

FOOTNOTES

[1] A MAUO is defined as the minimum practical unit of ownership consisting of 72,533.333 Fundamental Units of Ownership consisting of 64,000 usable bits per second and an additional 8,533.333 bits per second for multiplexing purposes.

[2] SEA-ME-WE 2 is a digital fiber optic submarine cable system which extends between and among Singapore, Indonesia, Sri Lanka, India, Djibouti, Saudi Arabia, Egypt, Italy, Tunisia, Algeria, France, Cyprus and Turkey. The cable system will link southeast Asia, the Indian subcontinent, the Middle East and western Eruope. AT&T will pay a sum of approximately $ 26.3 million for 900 half-MAUOs.

[3] EURAFRICA is a digital fiber optic submarine cable system which extends between and among France, Portugal, Morocco and Madeira Island. AT&T wll pay a sum of approximately $587,000 for 120 half-MAUOs.

[4] A MIU is defined as a 2.048 Mb/s digital bit stream and consists of two half-interests which are intended for use between two correspondents, respectively.

[5] UK-BEL 6 is a digital fiber optic submarine cable system which directly links the United Kingdom and Belgium. AT&T will pay approximately $ 7.6 million for 12 half-MIUs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CICI, INC. File No. I-T-C-91-149

Applications for Authority Pursuant
to Section 214 of the Communications
Act of 1934, as Amended, to Acquire
and Operate Capacity in the North
Pacific Cable System.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: August 12, 1991; Released: August 21, 1991

By the Chief, International Facilities Division:

1. We have under consideration the above-captioned application requesting authority to acquire capacity from Pacific Telecom Cable, Inc. (PTC) and to operate that capacity in the North Pacific Cable (NPC) system for the provision of authorized common carrier services between the United States and Japan, and points beyond. The NPC system is a private, non-common carrier, digital optical fiber cable system which extends between landing points at Pacific City, Oregon; Seward, Alaska and Miura, Japan.[1] CICI, Inc. requests authority to acquire by ownership a one-half interest in one E-1 circuit (30 64-Kbps) in the NPC system between the U.S. and Japan, and to lease necessary connecting facilities, for the provision of service to Japan. CICI, Inc. states that the facilities will be used to supplement its satellite facilities between the U.S. and Japan and will fulfill the need for additional circuits. The application was placed on public notice on June 26, 1991. No comments were received.

2. In 1985, the Commission adopted its private submarine cable policy to promote competition in the provision of international facilities.[2] It determined that an increase in competition in the provision of facilities would stimulate technology and service development to the benefit of international telecommunications users. The Commission did not preclude the possiblity that common carriers would be permitted to acquire capacity in private submarine cables for the provision of the carriers' services. It stated that it would require carriers interested in acquiring capacity in private cable systems to seek authority under Section 214 of the Communications Act. [3] However, the Commission emphasized that private cable systems shall succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of any private cable system. The Commission reiterated these policies in its *Conditional License* for the NPC cable system.[4]

3. We find that grant of the instant application will promote the policy aims of the Commission's *Private Submarine Cable* decision. In decisions granting applications of common carriers seeking to acquire capacity in the PTAT-1 private submarine cable system, we found that use of a portion of that cable system for the provision of common carrier services would enhance the viability and credibility of PTAT-1 as an alternative to common carrier facilities.[5] Here, as with PTAT-1, such use will facilitate the introduction of competition in the provision of international transmission facilities. The Commission has made it clear that the introduction of facilities-based competition into a market is a significant and positive step that is beneficial to the public.[6] Such competition will give service providers greater choice in selecting facilities and thus enable them to maintain, or improve, the economical and efficient provision of their services to the public. The opportunity to choose between facilities will further enable service providers to be more responsive to customer needs in terms of price, service, quality, and service availability. We have already extended these benefits to the POR through the grant of authority to other carriers to acquire interests in NPC capacity for the provision of common carrier services.[7] The proposal contained in the application before us, to convert a portion of the capacity of the NPC system to common carrier use, will further extend these types of public benefits to the POR.

4. We find that the applicant has provided the information necessary for us to grant its application.[8] In addition we find that the circumstances surrounding the instant application does not raise an economic impact issue.[9] Indeed the applicant indicates that the NPC system capacity it seeks to acquire will be used to supplement its authorized common carrier facilities, not to divert traffic from those facilities. The applicant will continue to use current satellite facilities for the provision of common carrier services. Moreover, no party has filed comments arguing that an adverse economic impact would result from the applicant's use of the requested NPC capacity for common carrier services. Therefore, we find that the factors presented in this case do not warrant consideration of an economic impact issue.

5. We also observe that the *Final License* for the NPC system contains a condition requiring PTC to maintain a fifty percent ownership and voting control of the NPC system, including one hundred percent ownership in the cable stations in Oregon and Alaska.[10] Sale of ownership interests in the NPC system raises questions regarding PTC's compliance with this condition. We shall condition the authorization granted herein upon the outcome of any future proceedings with PTC regarding this matter.

6. In view of the foregoing, we find that grant of authority for the applicant to acquire the NPC facilities it requests will serve the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, that application File No. I-T-C-91-149 IS GRANTED, and CICI, Inc. is authorized to:

a. acquire by ownership a one-half interest in and operate one E-1 circuit in the NPC Cable between the Oregon and Japan Cable terminals;

b. lease and operate any necessary connecting facilities; and

c. use said facilities to provide CICI's regularly authorized services between the U.S. and Japan and beyond.

8. IT IS FURTHER ORDERED that the authorization granted herein is subject to the results of any further proceedings regarding PTC's compliance with the conditions of the *Final License* for the NPC system.

9. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PTC under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§ 34-39).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (Com. Car. Bur. 1987) (Conditional License) and Pacific Telecom Cable, Inc., 4 FCC Rcd 8061 (1989) (Final License).

[2] Tel-Optik, Limited, 100 FCC 2d 1033 (1985) (Private Submarine Cable).

[3] The Commission restated this requirement in the International Competitive Carrier decision where it determined that it would require non-dominant carriers to file Section 214 applications to acquire capacity in future private cable systems. International Carrier Policies, 102 FCC 2d 812, 845 (1985).

[4] *See* Pacific Telecom Cable, Inc., 2 FCC Rcd 2686, 2688 (1987).

[5] *See* US Sprint Telecommunications Company Limited Partnership, 4 FCC Rcd 6279, 6282 (Com. Car. Bur. 1989) and CICI, Inc., 4 FCC Rcd 6622, 6623 (Com. Car. Bur. 1989).

[6] *See also* In the Matter of Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985).

[7] *See* American Telephone and Telegraph Company, 6 FCC Rcd 2870 (Com. Car. Bur. 1991).

[8] The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's Rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc., 4 FCC Rcd 4454 (1989) (Clarification Order).

[9] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the ommission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." Clarification Order, 4 FCC Rcd at 4456.

[10] The relevant condition provides that:

> The Licensee shall maintain no less than a fifty percent ownership and voting control share in the proposed cable, including one hundred percent ownership in the cable station in Oregon and in Alaska (and any additional U.S. landing points) and in the U.S. land portion of the cable from the station to the U.S. beach joint of the submersible portion of the proposed cable;

4 FCC Rcd at 8069.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD DIRECT, LTD. File No. I-T-C-90-100

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 13, 1991; Released: August 21, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by World Direct, Ltd., a Delaware Corporation (WDL).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-100 IS GRANTED, and WDL is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, Executive Telecard, Ltd.'s Tariff F.C.C. No. 1 and International 800 Telecom Corp's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariff.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA DE PUERTO RICO — File No. I-T-C-91-151

Application for authority to acquire and operate facilities for service to various points in the Eastern Caribbean area and Bermuda.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 13, 1991; Released: August 21, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Puerto Rico and the points listed in the Appendix by Telefonica Larga Distancia de Puerto Rico (TLD).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-151 IS GRANTED, and TLD is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis (or lease), a one-half interest in and operate 62 voice-grade circuits in the St. Thomas-Tortola Microwave Link;

b. acquire, on an IRU basis (or lease), a one-half interest in and operate six voice-grade circuits in the CARAC cable between Tortola and Bermuda;

c. acquire, on an IRU basis (or lease), a one-half interest in and operate the following circuits in the Digital Eastern Caribbean Microwave System:

Between Tortola and	No. of Circuits
Anguilla	4
Antigua	3
Barbados	5
Dominica	3
Grenada	3
Guadelupe	4
Martinique	3
Montserrat	4
Nevis	4
St. Kitts	4
St. Lucia	4
St. Vincent	4
Trinidad and Tobago	8

d. lease and any operate necessary connecting facilities; and

e. use said facilities to provide TLD's regularly authorized services between Puerto Rico and the points listed in the Appendix and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country
Anguilla
Antigua
British Virgin Islands (Tortola)
Barbados
Bermuda
Dominica
Grenada
Guadeloupe
Martinique
Montserrat
Nevis
St. Kitts
St. Lucia
St. Vincent
Trinidad and Tobago

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ABL NETWORK, INC. File No. I-T-C-91-152

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 13, 1991; Released: August 21, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by ABL Network, Inc. (ABL).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-152 IS GRANTED and ABL is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ASCOM AUTELCA COMMUNICATIONS, LTD. File No. I-T-C-91-159

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 13, 1991; Released: August 21, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Ascom Autelca Communications, Ltd. (Ascom).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-159 IS GRANTED, and Ascom is authorized to provide international switched voice service by the resale of the international switched voice service set forth in US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariff.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust — File No. 10564-CL-P-333-A-89

For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 333, Arkansas-10 Garland

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1991; Released: August 21, 1991

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION

1. On April 25, 1990, Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust (Chickasaw) filed a Petition for Reconsideration (Petition) of the dismissal of the captioned application by the Mobile Services Division (MSD). Thomas Domencich and the Committee for A Fair Lottery (Committee) filed an Opposition. Chickasaw filed a Reply. For the reasons discussed below, we deny Chickasaw's Petition.

II. BACKGROUND

2. By letter of March 16, 1990, the MSD dismissed the captioned application as defective because the President of Chickasaw and not the trustee signed the application in violation of Sections 1.743(a), 22.6(d) and 22.923(b)(7) of the rules.[1] In addition, because of this signature, it appeared that Chickasaw and not the CTC Scholarship Trust (CTC Trust) was the applicant. As a provider of landline service, Chickasaw was ineligible pursuant to Section 22.902(b) of the Commission's rules to file a cellular application for Frequency Block A.

3. The application FCC Form 401, filed on October 19, 1988, lists the applicant as "Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust." In Item 10 of the Form 401, the box for "corporation" is checked. J.B. Bright (Bright) signed the application and designated his title as "President". Bright is the President of Chickasaw. Bright also signed the certification on the transmittal sheet. The ownership exhibit in the application states that the telephone company had established the CTC Trust to provide scholarships to its employees and other beneficiaries, and that R. Philip Baker, a certified public accountant, was the trustee.[2] On December 1, 1989, an amendment was filed, signed by Bright and a new trustee for CTC Trust. Also submitted was an amended Form 401, designating the applicant as "CTC Scholarship Trust" and signed by the new trustee. Item 10 of the amended application identifies the applicant ownership as a "Trust." The amendment states that CTC Trust had always been the real party in interest. The amendment further states that the initial application listed "Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust" as the applicant in order to disclose that the telephone company had established CTC Trust and, as settlor, had obtained the firm financial commitment from a bank for the benefit of the Trust. [3] The amendment also submits the November 3, 1989 trust instrument.

III. DISCUSSION

4. In its Petition, Chickasaw contends that the MSD erred in determining that Chickasaw, rather than CTC Trust, was the applicant and real party in interest in the application. Chickasaw submits that Royce E. Gauntt, its controlling shareholder and Chairman of the Board of Directors of Chickasaw, orally created CTC Trust, on October 1, 1988, before the application was filed.[4] The trust document, Chickasaw submits, shows that Chickasaw does not retain any ownership interest in or control over CTC Trust.[5]

5. Chickasaw asserts that its president signed the application because the initial trustee expressed reservations about executing the certification on the application Form 401 and on the transmittal sheet. Chickasaw says that the initial trustee believed he could certify to the correctness of matter in the application pertaining to CTC Trust, but not to the truthfulness of information pertaining to Chickasaw, its shareholders, and radio interests under Part 22 of the rules.

6. Chickasaw argues that the MSD's dismissal was erroneous because the application was properly signed and filed. Chickasaw contends that Section 1.743(a) is silent on any signature requirements for a trust applicant. It adds that Section 22.923(b)(7) is similarly mute as to who must execute the transmittal sheet. Explicit notice of requirements must be given before dismissing an application for failure to meet stringent acceptability for filing criteria, maintains Chickasaw, citing *Metacomm Cellular Partners*, 4 FCC Rcd 4451 (1989). Chickasaw further contends that Section 1.743(a) was adopted by the Commission in response to an amendment in the Communications Act of 1934, as amended, (the Act) to eliminate the requirement of executing applications under oath. It argues that the regulation was not intended to require an individual to provide a certification under penalty of law when he did not believe he possessed the requisite knowledge to do so. Yet, Chickasaw insists, this is the effect of requiring a signature by the trustee.

7. In opposition, the Committee argues that Bright's signature on the application does not comply with the requirements of Section 1.743(a). In addition, it maintains that Chickasaw does not claim that Bright is CTC Trust's duly authorized representative. The Committee also argues that Chickasaw was the real party in interest behind the application, as the trust agreement identifies the Arkansas 10 RSA application, along with others, as "filed by [Chickasaw] on behalf of the Trust." The Committee also asserts that the trust mechanism utilized is insufficient to make CTC Trust a *bona fide* independent applicant. The Committee submits that the bank letter in the application shows that Chickasaw obtained the firm financial commit-

ment in its own name and the bank will lend the necessary funds to Chickasaw, which will advance the money to CTC Trust.[6]

8. It is unnecessary to decide whether Chickasaw or CTC Trust was the real applicant, because the application is defective under either factual conclusion. If we assume that Chickasaw was the applicant,[7] it was ineligible to apply for a nonwireline frequency anywhere in the country. The Commission has consistently prohibited wireline companies from filing cellular applications for all initial systems in areas where they do not provide local exchange service. *Cellular Communications Systems*, 89 FCC 2d 58, 76-77 (1982). *See also* 47 C.F.R. §22.902(b). The Commission expressly retained the prohibition, *i.e* wireline set aside, through the conclusion of initial filing periods for all cellular systems. *See Rules for Rural Cellular Service*, (*Order on Reconsideration*), 2 FCC Rcd 3366, 3369 (1987), *citing Cellular Lottery Rule Making*, 98 FCC 2d 175, 194-198 (1984). On the contrary, if we accept as true Petitioner's assertions that CTC Trust was the applicant,[8] we find for the reasons below that the application was improperly executed, and therefore defective.

9. As an applicant, CTC Trust must be held responsible for compliance with the Commission's rules, *see* Lorain Community Broadcasting Co., 18 FCC 2d 686 (1969), and is responsible for the application contents. *Ronald F. Trinchitella*, 4 FCC Rcd 6360, 6361 (1989), *aff'g* 3 FCC Rcd 343 (Com. Car. Bur. 1988) (*Trinchitella*); *Bruce M. Schorsten*, 2 FCC Rcd 5421, at n.3 (Com. Car. Bur. 1987) (*Schorsten*). This responsibility includes all aspects of prosecuting the application, including signing, pursuant to the rules.

10. In applying the signature requirement of Section 1.743(a), *see* note 1, *supra*, the Commission has consistently held that no one other than the individual applicant or one duly authorized to sign for an applicant entity, may sign the application. Otherwise, the signature violates Section 1.743(a) and renders the application defective. *Douglas R. Casey*, 3 FCC Rcd 7193 (1988) (*Casey*) (application signed by business agent found defective). *See also Clyde W. Pierce*, 4 FCC Rcd 2378, *aff'g* 2 FCC Rcd 3522 (Com. Car. Bur. 1987); *Schorsten*, *supra*. In enforcing Section 1.743(a) as to cellular applications, the Commission has stated that the nature of the signature requirement is unambiguous and that it clearly did not intend to permit signatures by anyone other than the party applying, absent compliance with the exception under the rules.[9] *See Trinchitella*, *supra*.[10]

11. The CTC Trust failed to file the application in compliance with Section 1.743(a). With respect to a trust entity, once the settlor establishes the trust form of ownership, the property passes immediately to the trust, and legal title vests in the trustee.[11] At that point, the settlor is not in any legal relationship with the beneficiaries or the trustee and has no powers with regard to administration of the trust.[12] Thus, when Chickasaw transferred the subject RSA application to CTC Trust prior to filing, the application became trust property that Chickasaw no longer had power to administer, *i.e.*, to prosecute before the Commission. The trust document does not indicate that Chickasaw reserved any control over CTC Trust, and Chickasaw maintains that it had none.[13] If the CTC Trust were valid at the time of filing, the initial trustee was the legal owner of the application with exclusive control. He was the sole principal who could deal with the trust property and be personally bound by the obligations made in administering CTC Trust.[14] Only he could file the trust property in applying for a cellular license. Therefore, the trustee was required to file the application as an individual applicant, and only the trustee's signature could comply with Sections 1.743(a) and 22.923(b)(7).[15] Petitioner's reference to the selection of Bright as the closest person to an authorized official is insufficient to show that its President was authorized to sign for CTC Trust.[16] On the basis of the foregoing, we affirm the MSD's conclusion that the CTC Trust application was unacceptable for filing because it was improperly signed and certified.[17]

12. On further review, we also find that the application is defective because it lacks a firm financial commitment from the lending institution to the applicant, CTC Trust, pursuant to Section 22.917(c). The financial requirements have been based on Commission policy that an applicant must be individually financially qualified to build and operate its proposed system. *Fourth Report and Order*, 4 FCC Rcd 2542 (1988), *petition for recon. denied* 4 FCC Rcd 4464 (1989). The rules require that an applicant comply with Section 22.917(c) and have a firm financial commitment for the applicant to build and operate its proposed system. The bank letter shows that the bank made the commitment to Chickasaw, assessed Chickasaw's creditworthiness, and noted that Chickasaw was the entity guaranteeing the loan.[18] Though expressing that the CTC Trust is filing RSA applications, and that Chickasaw will advance the committed funds as debt or equity to CTC Trust, the letter does not demonstrate a commitment from the bank to CTC Trust. Therefore, this letter fails to comply with Section 22.917(c) of the rules.[19]

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed by Chickasaw Telephone Company for the Benefit of CTC Scholarship Trust IS DENIED.

14. IT IS FURTHER ORDERED THAT the dismissal by the Mobile Services Division of the application filed by Chickasaw Telephone Company for the Benefit of the CTC Scholarship Trust for Market No. 333, Arkansas 10 - Garland, IS AFFIRMED for the reasons stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

FOOTNOTES

[1] Section 1.743 provides in pertinent part, that ". . . applications . . . shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer or duly authorized employee, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association." *See* 47 C.F.R. §1.743(a). Section 22.6(d) provides that applications shall be signed as prescribed by Section 1.743(a). *See* 47 C.F.R. §22.6(d). Section 22.923(b)(7) requires that an applicant for a

Rural Service Area (RSA) must make a certification on the Transmittal Sheet submitted with the microfiche copies of its application. The certification must be signed by an authorized representative of the applicant. *See* 47 C.F.R. §22.923 (b)(7).

[2] The exhibit also states that "[neither] the applicant, nor its officers, directors or shareholders nor the Trustee or Beneficiaries of [CTC Trust]" have interests of one percent or greater in other applications in the RSA.

[3] The amendment also includes minor engineering changes.

[4] Chickasaw asserts that the formation of CTC Trust complied with Texas Trust Code §112.004, since the trust was later reduced to writing.

[5] That Chickasaw is not the real party in interest, says the Petitioner, renders moot the issue of Chickasaw's eligibility to apply for the nonwireline frequency block. However, Petitioner argues, even if Chickasaw were the applicant, Section 22.902(b) deems a telephone company a wireline carrier for the purpose of eligibility only in markets where it provides wireline telephone service and does not prevent a telephone company from applying outside those markets for Frequency Block A. Petitioner asserts that a prohibition against such telephone company applications was expressed in *Cellular Communications Systems*, 89 FCC 2d 58, 77 (1982), but was not incorporated into Section 22.902(b).

[6] Chickasaw's Reply contends that the Committee has not demonstrated its standing to participate in this proceeding. We have found that the Committee has standing to contest RSA cellular applications. *Nancy Naleszkiewicz*, 5 FCC Rcd 7131 (Com. Car. Bur. 1990).

[7] The information contained throughout the application as filed, indicates that Chickasaw was the applicant. This information includes the identification of the applicant as a corporation, and a statement that Chickasaw, for the benefit of CTC Trust, is the real party in interest. *See also* para. 3 and note 2, *supra*. The signing of the application, as well as the firm financial commitment to Chickasaw, also point to it as the applicant. Exhibit 11, Financial Qualifications, states that ". . . Applicant has obtained a firm financial commitment . . . [and] . . . that Applicant has the financial ability . . . ." The bank letter is addressed to the President of Chickasaw and states that the bank ". . . provides a firm and binding commitment . . . to Chickasaw Telephone Company . . . ."

[8] However, the CTC Trust was not reduced to writing when the application was filed. Chickasaw's assertions, *see* paras. 4-5, and note 4, *supra*, fail to clarify whether at that time the Trust was valid and enforceable and thus a *bona fide* applicant. One apparent reason that the initial trustee did not sign the application was due to the oral nature of CTC Trust. *See* Petition, pp. 5-6, and Trustee's Declaration. His later statement that he did not doubt the validity of CTC Trust is contradictory. *See* Chickasaw Reply.

[9] The one strict exception provides for the signing by the applicant's attorney in the event the applicant is disabled or absent from the United States. *See* 47 C.F.R. §1.743(b).

[10] Chickasaw's argument that its applications should not have been dismissed because pursuant to *Metacomm*, *supra*, there was no explicit notice of what Section 1.743(a) and 22.923(b)(7) require is inapposite here. *Metacomm* only held that the Commission gave insufficient notice of specific criteria that microfiche copies be signed. That there is no express prohibition in Section 1.743(a) against someone other than a trustee or trust officer signing the application is irrelevant. *See generally Trinchitella*, 4 FCC Rcd at 6360.

[11] *See* Restatement (Second) of Trusts §2 (1959).

[12] *See* Bogert, Trusts & Trustees, §42 (rev. 2d ed. 1984). Such a change in the settlor's relationship with the property is complete, unless either the trust document, or statute, expressly provides otherwise. *Id.*

[13] The trust document, allegedly incorporating the terms orally expressed prior to filing the application, merely indicates that Chickasaw could add property to CTC Trust, but does not indicate that anyone other than the trustee had the power to file the application. Chickasaw does not refer to any Texas Trust Code section that would provide it authority to act for the trustee in the absence of a provision in the trust document.

[14] *See* Restatement (Second) of Trusts §§261, 262 (1959); 76 Am. Jur. 2d §351 (1975). *See also* Bogert, *supra*, §712.

[15] Petitioner contends that requiring the trustee's signature pursuant to Section 1.743(a) forces him to certify the truth of all facts in the application whether or not he has knowledge of them. The contention is erroneous. Because an applicant is responsible for the application contents, *see* para. 9, *supra*, it is responsible for investigating all facts in the application and verifying that they are true and correct to the best of its information and belief. Subsequent to the exercise of this responsibility, an RSA applicant would then be able to certify its application in accordance with Section 22.923(b)(7).

[16] To comply with Section 1.743(a), the signing of the application could not be delegated. It also could not be executed by a power of attorney unless the limited exception of Section 1.743(b) applied. *See* note 11, *supra*.

[17] Further, the December 1, 1989 amendment, submitting name and signature changes, to indicate that CTC Trust was the applicant, para. 3, *supra*, is not acceptable. Applications unacceptable for filing may not be amended after the filing date to bring them into compliance with the rules. *See Casey*, *supra*.

[18] *See* note 8, *supra*. Section 22.917(c) requires in pertinent part that the lender commit the sum certain to the particular applicant, that the lender assess the applicant's creditworthiness, and that the applicant is the only entity guaranteeing the commitment. 47 C.F.R. §22.917(c)(5).

[19] Later explanations for the selection of financing, *i.e.*, that the bank could lend at a lower rate to Chickasaw, and that CTC Trust did not have assets, see Chickasaw Reply, do not bring the applicant into compliance with Section 22.917 of the rules.

Before the
Federal Communication Commission
Washington, D.C. 20554

In re Application of

CHARLOTTE L. OLIVE File No. 10317-CP-P-409-A-88

For authorization to construct and operate a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve Market 409, Indiana 7-Owen Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1991; Released: August 21, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition for reconsideration (Petition) and a supplement thereto, filed by Dean M. Mosely (Mosely) in the matter of *Charlotte L. Olive*, 5 FCC Rcd 5631 (Mob. Serv. Div. 1990) (*Order*). [1] For the reasons discussed below, we deny Mosely's petition.

II. BACKGROUND

2. By Public Notice, released on September 1, 1989, the Mobile Services Division (MSD) of the Common Carrier Bureau named Charlotte L. Olive (Olive) as the tentative selectee for the nonwireline cellular licensee for the Indiana 7-Owen Rural Service Area. The Public Notice established October 20, 1989 as the deadline for filing petitions to deny. No petition to deny was filed. Nevertheless, on February 21, 1990, Mosely petitioned the MSD to reconsider its action granting the above-captioned application. He alleged that Olive lacks the character qualifications to hold a Commission authorization because she had indicated to Mosely that she was not going to pay federal taxes and that she converted bonds belonging to her ex-husband. Olive denied these allegations. Because Mosely had failed to participate earlier in the proceeding by filing a petition to deny, the *Order* dismissed Mosely's petition as untimely filed. *See* 47 C.F.R. § 1.106(b)(1). The *Order* also found that Mosely's allegations did not raise questions of fact warranting further administrative inquiry.[2] Mosely now asks for reconsideration of the decision to dismiss his petition.

III. DISCUSSION

3. Mosely's petition argues that the MSD erred in each of its findings. On November 27, 1990, Mosely amended his petition, adding a new allegation that Olive forged Mosely's signature on one document and altered others, which she used in the proceeding before the MSD as a basis for a claim that an attorney/client relationship existed between them as a defense to Mosely's allegation of tax evasion. Consequently, Mosely claims that the *Order* must be reconsidered and an evidentiary hearing must be held to resolve Olive's character qualifications.

4. *Procedural Claim.* Mosely contends that the MSD's *Order* erroneously held that he had not shown good cause why he could not have participated in the proceeding earlier and therefore improperly dismissed his petition to deny pursuant to § 1.106(b)(1) of the Commission's rules. It is not necessary for us to address Mosely's contentions with respect to the timeliness of his claim. As discussed below, even if Mosely's petition was not procedurally defective, we have fully considered the petition on its merits and conclude that it should be denied.

5. *Substantive Claims.* Mosely contends that the MSD erred in failing to conclude that Olive had committed the criminal offenses of tax evasion and conversion. Mosely submits that these errors stem, in part, from the MSD's misplaced reliance on *Policy Regarding Character Qualifications in Broadcast Licensing*, [3] which states that allegations concerning non-FCC related conduct may only be considered after the allegations have been adjudicated by an appropriate trier of fact. The MSD's misplaced reliance is particularly evident, says Mosely, with regard to Olive's violation of the tax law. Initially, he submits that it is not clear that her misconduct was not FCC related. While conceding that tax evasion is not within the purview of the Commission, Mosely contends that the income in question was obtained through Olive's marketing of FCC cellular applications. Therefore, he maintains that there is a clear nexus between the misconduct and the Commission. Secondly, Mosely says that even if there were no nexus, the MSD failed to take into account the recent modification to its character qualifications policy, which now provides the Commission with discretion, in some circumstances, to pursue non-FCC related misconduct absent a conviction.[4] Mosely concludes that the MSD was, therefore, not foreclosed from considering his allegations of misconduct.

6. Mosely's arguments are unpersuasive. He has failed to demonstrate that the MSD's findings in its *Order* did not comport with established policy or failed to consider all of the allegations presented. Failure to pay income taxes is not FCC-related misconduct. Furthermore, the mere fact that money may have been earned from the brokerage of cellular applications does not mean that the FCC has a jurisdictional interest in how the income is reported to the IRS. Moreover, and contrary to Mosely's assertion, the MSD did consider and follow the Commission's most recent character policy guidelines in its analysis of the issues raised by Mosely.[5] The MSD found that Mosely's allegations of non-FCC related conduct did not involve extraordinary circumstances requiring Commission intervention. In this respect, the record also reveals that Mosely's allegations of tax evasion and theft have been presented to the local United States Attorney and District Attorney respectively and both have declined to take any action against Olive. In these circumstances especially, we agree that there is no extraordinary reason to initiate an inquiry into Olive's character. *See, e.g., IT&E Overseas, Inc.*, 4 FCC Rcd 3774 (1989).[6]

7. Mosely also alleges that Olive falsely stated to the Commission that Mosely prepared for her Articles of Incorporation, an Affidavit of Registered Agent and an Act of Donation. In a supplement to his Petition for Reconsideration, Mosely also alleges for the first time in

this proceeding, that Olive forged his signature notarizing the Act of Donation.[7] Similarly, he alleges that she photocopied his signature to establish falsely that he notarized a set of Articles of Incorporation and an Affidavit of Acceptance of Appointment by Designated Registered Agent. Olive denies all of these allegations.

8. At the outset, an examination of the record reveals that Olive did not submit as evidence in this proceeding any of the documents with the allegedly forged signatures, nor does Olive ever refer to the existence of Mosely's signature on these documents. The only mention of the documents is found in Olive's Opposition to Petition for Reconsideration, wherein she declares that Mosely performed numerous legal services on her behalf. Specifically, among the dozen or so legal activities mentioned, she states that Mosely "prepared Articles of Incorporation . . . [and] an affidavit of acceptance of appointment of registered agent . . . " *Declaration of Charlotte Olive Vick* at para. 6. She also states that Mosely "prepared and telecopied for her an Act of Donation . . . ." *Id.* In his Reply to Opposition to Petition for Reconsideration, Mosely, in his own affidavit, admits that he prepared the Act of Donation as well as performed the work relating to the Articles of Incorporation and acceptance of appointment. Declaration of Dean M. Mosely at paras. 9 & 10. In these circumstances, Mosely has not raised even a prima facie case of misrepresentation, supported by affidavit, that supports his claim of misrepresentation. For the same reasons, Mosely has not raised a substantial factual question of misrepresentation warranting a hearing. Mosely has admitted that he "prepared" the documents (whether or not he signed them) and Olive claimed no more than that in her statements to the Commission.[8]

9. We note that a Commission licensee's conviction for forgery, as well as fraud or theft, would normally be relevant to whether the licensee possesses the requisite character qualifications to retain his authorization. As previously indicated, unless the alleged misconduct has been adjudicated by a forum having appropriate jurisdiction over these matters, the Commission normally will not consider such matters. *Policy Statement and Order*, 5 FCC Rcd 3252, 3254 n. 5 (1990). Should it be subsequently determined, in a appropriate forum, that Mosely's charges of forgery are warranted, we will revisit these issues.

IV. CONCLUSION

10. We find that Mosely's allegations do not make a prima facie case nor raise a substantial issue of fact regarding Olive's alleged misrepresentation to the Commission so as to require a hearing. Further, we shall not consider in the first instance Mosely's allegations regarding non-FCC related misconduct. Therefore, we are denying his petition for reconsideration.

V. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED THAT the petition for reconsideration filed by Dean M. Mosely IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] The subject petition for reconsideration has been referred to us by the Chief, Common Carrier Bureau, pursuant to 47 C.F.R. §§1.104(b), 1.106(1).

[2] In the *Order* the MSD also dismissed Mosely's petition for reconsideration of its grant of an application for the *pro forma* assignment of Olive's construction permit. Mosely has asked that that portion of the *Order* be reconsidered also. For the same reasons as stated herein, we uphold the Bureau's decision to deny Mosely's Petition for Reconsideration of the pro forma assignment.

[3] 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986).

[4] *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990).

[5] *Order*, 5 FCC Rcd at 5633 n. 10; *see Policy Statement and Order*, 5 FCC Rcd 3252 (1990), *recon. granted in part, Memorandum Opinion and Order*, FCC 91-146, released May 24, 1991.

[6] Mosely also contends that Olive does not possess the requisite character qualifications to be a Commission licensee because Olive lied to the Commission when she denied committing the alleged tax evasion and conversion offenses. However, consideration of this allegation effectively would require us to reach a determination on the alleged criminal conduct itself, which we have already concluded should not be adjudicated by the FCC in the first instance.

[7] An Act of Donation is a document attesting that certain property has been donated from one party to another.

[8] Mosely's Supplement states that Mosely, in a new affidavit, denies having prepared the Act of Donation. Supplement to Petition for Reconsideration at 5. However, in his new affidavit, Mosely merely states that he did not sign the allegedly forged documents; nowhere does he retreat from his earlier declaration that he (or his secretary) prepared the documents. *See* Affidavit of Dean M. Mosely. Thus, the bare claim that Mosely did not prepare the documents is not supported by any affidavit from Mosely and, moreover, is inconsistent with Mosely's earlier sworn declaration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Application for Review

Application for Renewal of License
of Community Television of
Southern California for
Station KCET(TV),
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1991; Released: August 21, 1991

By the Commission:

I. INTRODUCTION

1. On November 1, 1988, the National Hispanic Media Coalition (NHMC) filed a petition to deny the application for license renewal of Community Television of Southern California for KCET(TV), Los Angeles, California. NHMC argued that Hispanics were underrepresented in the station's workforce. By letter dated August 29, 1989, the Mass Media Bureau denied the NHMC petition. On September 11, 1989, the Bureau unconditionally renewed KCET's license (File No. BRET-880728KF). On September 28, 1989, NHMC filed an application for review of that decision.[1] In the application, NHMC requests that the Commission grant its application for review of the renewal, designate the renewal application for hearing or impose other sanctions on the licensee. Herein, we find that there is no basis on which to reverse the Bureau's action.

II. BACKGROUND

2. The Bureau renewed KCET's license unconditionally based upon the following information. Through Annual Employment Reports (Form 395B), the licensee's Equal Employment Opportunity Program (Form 396), and pleadings associated with NHMC's petition to deny, the licensee presented information to the Commission indicating that it had an active, productive affirmative action plan and no substantial statistical disparities. *See* discussion of *Bilingual Bicultural Coalition on the Mass Media v. Federal Communications Commission*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), at paragraph 8, *infra*. The licensee presented information to the Bureau indicating that the licensee contacted 55 recruitment sources during the license term, including 19 minority-specific sources. In addition, before the end of the term, the licensee added 32 more minority-specific sources to its contact list. The Bureau noted in its August 29, 1989 letter to NHMC that the licensee contacted more than 40 recruitment sources from which it received at least 258 minority referrals during the 12-month period prior to the expiration of its license term. In addition to 258 known minority referrals, the licensee indicated that it may have received more but did not have records concerning referrals from some sources. A record including at least 19 minority-specific sources during all of the term and 258 minority referrals in 12 months, as well as the actual hires noted below, indicates considerable effort. In this latter regard, the Bureau noted that during this 12-month period, the licensee hired 71 people, 35 of whom were minorities.[2] Of these hires, 32 were upper level, 11 of whom were minorities. The record also indicated that the licensee's employment of Hispanics increased every year during the license term except in 1986.

III. PLEADINGS

3. NHMC first contends that its petition to deny should have been referred to the Commission rather than being acted on by the Bureau. NHMC notes that Section 0.283 (b)(1) of the Commission's Rules, 47 C.F.R. Section 0.283 (b)(1)(iii), provides that a broadcast application is reviewed by the Commission if the applicant "falls outside the applicable processing criteria in its employment of women and minorities." NHMC contends that the Bureau erred in failing to use the updated statistical data submitted by NHMC rather than the 1980 census data used by the Commission in evaluating the station's statistical profile. NHMC asserts that the Hispanic population of Los Angeles increased dramatically and use of the new data shows that the licensee's hiring and promotion of Hispanics and other minorities in the top three job categories fell below the Commission's processing guidelines. Furthermore, NHMC argues that its contention that the Commission's use of 1980 census data is obsolete presented a "new" issue which the Commission should have reviewed as required by 47 C.F.R. Section 0.283 (b)(1)(i).

4. Next, NHMC submits that the Bureau erred in failing to issue a letter of inquiry to the licensee. NHMC argues that it is the Bureau's practice to send such a letter if initial review reveals an inadequate EEO record. In this case, NHMC contends that the Bureau found EEO deficiencies which were more serious than those found in other situations in which the Bureau sent inquiry letters. Maintaining that minority representation in the Los Angeles labor force increased from 41.9% in 1980 to at least 47% by 1988, and that the licensee failed to explain adequately its lack of EEO efforts at the beginning of the license term, NHMC argues that an inquiry was necessary.[3] NHMC states that these deficiencies were "expressly acknowledged" in the Bureau decision and the licensee was admonished for poor recordkeeping.

5. NHMC further asserts that the unconditional renewal of KCET's license is contrary to Commission precedent. In support of its contention, NHMC cites various Commission decisions that imposed reporting conditions.[4] In general, NHMC contends that these cases are comparable to KCET because the licensee's EEO Program Report (FCC Form 396) fails to acknowledge its low number of upper-level minority hires, its failure to promote minorities, or its inadequate recordkeeping and self-assessment. NHMC also states that the licensee's recruitment sources were unproductive. It notes that many of the sources the licensee listed produced no referrals, and contends that the Bureau erroneously construed several minority organizations as recruitment sources, since the licensee conceded that it maintained contacts with such sources but is unable to provide the number of referrals which resulted.

IV. DISCUSSION

6. NHMC first argues that the Bureau should have used data more recent than the 1980 census in evaluating the licensee's EEO program. According to NHMC, if the Bureau had used the more recent data showing a greater Hispanic labor force than that shown by the 1980 census figures, the licensee would have been substantially below processing guidelines necessitating action by the Commission rather than by the Bureau.

7. We find that the Bureau properly reviewed the licensee's EEO record using 1980 census data. In this connection, we note that we have consistently used census data as an objective criterion for evaluating broadcasters' EEO programs. NHMC has presented no justification to depart from this practice. The alternative data proffered by NHMC is purely speculative. In particular, one set of alternative data urged by NHMC was compiled by the Los Angeles County Department of Health Services and consists of estimates and projections of future population trends. The other alternative data suggested by NHMC are the opinions of a census employee about an unreleased census estimate for 1985, in which the employee states that Hispanics may comprise more than 30% of the Los Angeles labor force. Instead of compiling the estimates and opinions of possibly numerous individuals or organizations that study the population of an area, it is fairer and more reasonable for all licensees to be held to the same standard. It helps licensees engage in meaningful self-assessment to know at all times the relevant figures against which they are evaluated instead of substituting new figures from year to year. For these reasons, the Bureau properly rejected NHMC's proposed alternative data and proceeded to evaluate the licensee's record using census data[5] and the Commission's internal processing guidelines. Because the licensee's record fell within the guidelines, there was no need to refer this matter to the Commission.

8. Second, NHMC asserts that, in this case, the Commission should have sent an inquiry letter to the licensee. In *Bilingual*, the court ruled that the FCC may conduct inquiries but is not required to do so in all cases. *Id.* at 629, 630. The factors which may require the FCC to make inquiries are a "languishing affirmative action plan," and "statistical evidence of substantial underemployment of minority groups" or "well pleaded allegations of overt discrimination." *Id.* at 630. However, none of these factors are present here. *See* paragraph 2, *supra*. Therefore, NHMC's argument in this area is without merit.

9. Lastly, NHMC argues that renewing KCET's license without sanction is contrary to Commission precedent. Maintaining that the licensee's EEO program fails to acknowledge its low number of upper-level minority hires, its other recruitment failings and the lack of minority referrals from many of the licensee's sources, NHMC contends that the Bureau erred in renewing the license without sanction. Without offering specific comparative analysis, NHMC lists four cases in which the Commission imposed reporting conditions. However, the cases cited by NHMC reflect more egregious deficiencies than those of KCET.[6] The record reveals that the licensee here did not rely on unproductive sources but, rather relied on many sources which produced numerous referrals. While the licensee was admonished to keep more complete records of referrals, the licensee did keep records of referrals from most sources.

V. CONCLUSION

10. We find that NHMC failed to raise any substantial and material questions of fact warranting modification or reversal of the Bureau's decision to grant unconditional renewal of Community Television of Southern California's license for KCET.

VI. ORDERING CLAUSES

11. Accordingly, *IT IS ORDERED*, that the application for review, filed by NHMC, of the application for renewal of license of Community Television of Southern California for KCET(TV), Los Angeles, California, is *DENIED*.

12. *IT IS FURTHER ORDERED* that the Mass Media Bureau send by Certified Mail, Return Receipt Requested, one copy of this Memorandum Opinion and Order to the licensee of KCET and to the complainant.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On December 17, 1990, the Committee on Media Integrity (COMINT) filed a pleading styled as an "informal objection" against the renewal of KCET's license. COMINT requested that if KCET's license were renewed, conditions should be placed on the license. As previously mentioned, KCET's license was renewed more than a year before COMINT filed its pleading. The Commission's Rule on informal objections, 47 C.F.R. Section 73.3587, applies only to objections filed "before FCC action on any application . . . ." Therefore, COMINT's pleading is dismissed.

[2] The Los Angeles/Long Beach Metropolitan Statistical Area (MSA) includes 42.8% women and 41.9% minorities (24.4% Hispanic, 10.8% Black, 6.1% Asian/Pacific Islander and .6% American Indian). The licensee's 1988 Annual Employment Report indicates that KCET employed 253 full-time employees overall (167 upper-level), including 78 minorities (30.8%), of whom 31 (12.3%) were Hispanic. In 1987, the licensee employed 220 employees (145 upper-level), including 62 minorities (28.2%), of whom 22 (10.0%) were Hispanic. In 1986, the licensee employed 199 employees (126 upper-level), including 59 minorities (29.6%), of whom 19 (9.5%) were Hispanic. In 1985, the licensee employed 185 employees (117 upper-level), including 54 minorities (29.2%), of whom 20 (10.8%) were Hispanic. In 1984, the licensee employed 156 employees (101 upper-level), including 36 minorities (23.1%), of whom 14 (9.0%) were Hispanic.

[3] KCET's license was renewed more than 10 months after NHMC filed its petition to deny. NHMC implies that the Bureau should have spent more time considering the allegations raised in the petition to deny. We find that the Bureau took adequate time to consider evidence and arguments from both sides in this case.

[4] These include *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988) (*Florida Renewals*); *Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988) (*Michigan / Ohio Renewals*); *Applications*

of Arkansas Educational Television Commission for Renewal of License of Stations WLPB-TV, et. al., Baton Rouge, LA, 3 FCC Rcd 1923 (1988) (*Arkansas/Louisiana Renewals); Application of the Baltimore Radio Show, Inc. for Renewal of License of Station WFBR, Baltimore, MD*, 3 FCC Rcd 5913 (1988) (*Baltimore Radio).*

[5] NHMC also questions the Bureau's reliance on an Equal Employment Opportunity Commission (EEOC) computer tape. NHMC claims that, while the EEOC tape segregates data into nine job categories, the FCC only considers labor force data for all jobs taken together. In fact, we do review separate data for each full-time upper-four job category. In addition, we evaluate performance based on the licensee's employment record in all job categories, as well as the record in upper-four job categories.

[6] *In Florida Renewals*, WTGL-TV, Cocoa, Florida, had no meaningful self-assessment until after its license term ended, did not employ any members of the dominant minority group in its area (Blacks) for most of its term and did not employ any minorities in its renewal year. Station WXEL-TV, West Palm Beach, Florida, also maintained inadequate self-assessment, typified by few minorities in applicant pools and failure to address the effectiveness, or lack thereof, of its sources. During the last three years of the term, minority representation declined at WTWC-TV, Tallahassee, Florida, yet the licensee did not address the problem or engage in adequate efforts to contact sources likely to refer minority applicants. Minority representation decreased over the entire term of WNFT-TV, Jacksonville, Florida, yet the licensee dropped sources which had been productive and did not increase sources to help address this problem. The number of Blacks on the staff of WJTC(TV), Pensacola, Florida, declined during its term and yet the licensee had few efforts to contact productive sources. In *Michigan/Ohio Renewals*, WUAB(TV), Lorain, Ohio, considered few minorities for openings despite a decline in minority representation on the staff and hired no minorities for any of its 12 hires in the last two years of its term. Both WXMI(TV) and WGVC(TV), Grand Rapids, Michigan, failed to track minority referrals from sources and were unable to self-assess adequately. Station WXMI(TV) employed no Blacks (the dominant minority) in full-time positions and that licensee hired no minorities out of the 10 hires in the last year of its term. There were no Blacks in upper-level positions at WGVC(TV) for the last four years of its term. All three of the stations in *Arkansas/Louisiana Renewals* that received reporting conditions failed to track referrals or failed to do so adequately and failed to self-assess. In addition, during the year prior to its renewal year, KETS(TV), Little Rock, Arkansas, hired no minorities out of 18 full-time hires (four permanent employees and 14 full-time temporary employees). Station WLPB-TV, Baton Rouge, Louisiana, sought referrals for only a few of its openings. The licensee in *Baltimore Radio* only recruited for eight of its 15 openings during the term, received only one minority referral and hired only one minority.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

King Broadcasting Company
Licensee of KING-TV,
Seattle, Washington

for

Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1991; Released: August 22, 1991

By the Commission:

INTRODUCTION

1. The United States Court of Appeals for the District of Columbia Circuit remanded the Commission's decision in the captioned proceeding for a determination as to whether certain programs proposed to be broadcast by King Broadcasting Company (King)[1] during the 1988 presidential election campaign are within the Section 315(a)(4)("on-the-spot coverage of a bona fide news event") exemption of the Communications Act (47 U.S.C. Section 315(a)(4)). *King Broadcasting Company v. FCC*, 860 F.2d 465 (D.C. Cir. 1988). The court held that we had failed to provide a reasoned explanation for what it deemed a departure from our precedent. The court did not reach the First Amendment argument King also raised. After review, we believe our earlier decision should be reversed. Also, in light of our decision herein to reverse this ruling and grant King's request, the constitutional challenge to Section 315 is mooted.

BACKGROUND

2. Prior to the 1988 campaign season, King proposed to air a series of 3-4 programs involving appearances by the two major party presidential candidates. The first and last programs in the series were to be one hour long, comprised of two back-to-back, thirty-minute statements by the candidates presenting their essential campaign messages. King indicated that there would be at least one, possibly two, one and one-half hour programs in the middle of the series, comprised of back-to-back forty-five minute interviews of each candidate by a journalist or journalists selected by the licensee. According to King, it would air each taped broadcast simultaneously on its own stations and other interested stations and cable systems, and would make the programs available to other stations for broadcast within a few days, but no more than a week, after taping.

3. In October 1987, the Mass Media Bureau ruled that neither format qualified for exemption from Section 315. *WEBE - 108 Radio Company*, 2 FCC Rcd 5963 (1987). First, with respect to the opening and closing "non-interview" segments of the series, the Bureau found that, unlike exempt debates and press conferences, these segments lacked the presence of press or other candidates to challenge and add a degree of spontaneity to the event. In this regard, the Bureau focused on the fact that debates and press conferences, which are exempt, permit such spontaneous interaction and therefore do not necessarily yield favorable publicity for the candidate. In contrast, the Bureau believed the *carte blanche* provision of free air time to the candidates was more like advertisements by the candidates than *bona fide* news events. Second, the Bureau was unable to find that the "interview" segments of the series were on-the-spot coverage of news events since they were clearly interviews, falling into the Section 315(a)(2) category of "bona fide news interviews." Considered as such, the Bureau held that the segments could not qualify for a Section 315(a)(2) exemption because they did not satisfy the explicit requirement established by Congress that such programs be "regularly scheduled." The Bureau stated that it would not interpret Section 315(a)(4) as a catchall for programming that was intended by Congress to be covered by one of the other categories. The Bureau did not address King's constitutional arguments. King asked for Commission review of the Bureau's decision. Pursuant to 47 C.F.R. Section 1.115(g), we denied King's application for review. *Review denied*, FCC 88-162, released May 13, 1988. King appealed our denial to the United States Court of Appeals for the District of Columbia Circuit.

4. In remanding this case, the court ruled that we were correct in concluding that the proposed interview segments did not qualify for exemption under Section 315(a)(2) as "bona fide news interviews" because they were not regularly scheduled, a requirement that is clear from the legislative history. 105 Cong. Rec. 17829 (1959). The court found, however, that the legislative history was unclear regarding the requirements for exemption under Section 315(a)(4). Thus, the court said that the construction of this exemption was left to the exercise of the Commission's reasoned discretion to apply in a consistent manner. The court also ruled that we had failed to provide any explanation for an apparent inconsistency with precedent in this area. Specifically, the court held that we had failed to apply, or to explain why we had not applied, a test set out in *Aspen Institute*, 55 FCC 2d 697 (1975), *aff'd sub nom. Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). There, according to the court, in the context of a declaratory ruling on candidate debates and press conferences, we said that a program could qualify as a bona fide on-the-spot news event exempt under Section 315(a)(4) if the program is genuinely newsworthy and the broadcasters' belief in the newsworthiness of the program was based on good faith news judgment and not to advance any particular candidacy. Finally, although the court acknowledged the concern that Section 315(a)(4) could become a catchall for programming not otherwise exempt, it said this concern cannot excuse an absence of reasoned decisionmaking and a departure from the application of apparent precedent.

DISCUSSION

5. Section 315 of the Communications Act provides that whenever a licensee permits a legally qualified candidate to "use"[2] a broadcast station, it must afford "equal opportunities" to all other legally qualified opponents. The fundamental objective of Section 315 is to ensure that broadcasters do not use their facilities in a manner that favors one legally qualified candidate for public office over the other candidates for that office, and at the same time to maximize meaningful coverage of political campaigns and the news events so as to cultivate a fully informed electorate.

6. In 1959, the Commission ruled that an appearance by the incumbent mayor of Chicago during a newscast triggered the equal opportunity requirement. *Lar Daly*, 18 Rad. Reg. (P&F) 238, *recon. denied*, 26 FCC 715 (1959). Congress, concerned that this holding would virtually eliminate broadcast news coverage of the election process, enacted legislation in the same year creating four specific categories of news programming which would be exempt from Section 315:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

Public L. No. 86-274, Section 1, 73 Stat. 557 (1959) (amending 47 U.S.C. Section 315).

7. After years of construing the exemptions narrowly, in 1975 we extended the "news events" exemption. In *Aspen*, *supra*, we held that debates between legally qualified candidates were exempt from equal opportunities requirements as "on-the-spot coverage of bona fide news events" if they were sponsored by non-broadcast entities, such as the League of Women Voters. Reversing a prior decision, *Aspen* also held that presidential press conferences could qualify as exempt news events under Section 315(a)(4). We examined the two types of programming involved -- a live non-broadcaster sponsored debate aired in its entirety and a live presidential press conference -- and found that, given the specific format and other circumstances presented, we could rely on a broadcaster's determinations that the programs possessed genuine newsworthiness absent evidence of a broadcaster's intent to advance a particular candidacy.

8. In 1983, we further expanded the Section 315(a)(4) exemption by ruling that broadcaster-sponsored debates could be exempt. *Henry Geller*, 95 FCC 2d 1236, *aff'd*, *League of Women Voters v. FCC*, 731 F.2d 995 (D.C. Cir. 1983). We held that a debate's exempt status need not depend on the identity of the sponsoring entity. We also found it unnecessary to specify a fixed period within which an exempt debate must be broadcast or rebroadcast to qualify as "on-the-spot" coverage. We said that broadcast of any "reasonably recent event" would qualify for maintaining the "on-the-spot" character of the exemption.

9. In *Kennedy for President Committee*, 77 FCC 2d 965, 968-69, *aff'd Kennedy for President Committee v. FCC*, 636 F.2d 417, 427 n. 64 (D.C. Cir. 1980), we explained more explicitly than in *Aspen* that, in making the analysis of whether a program is exempt, the Commission will, first, "determine whether a particular scenario falls within one of the classes of appearance exempt under Section 315(a)(1)-(4)." Second, the Commission explores "whether a particular broadcast which is claimed exempt was presented using a broadcaster's good-faith news judgment." The second, "good faith" aspect of the analysis, noted by the court in *King* as having not been applied to King's request, places considerable reliance on the exercise of a broadcaster's journalistic discretion to determine "newsworthiness" once it is determined an exempt news event is involved. Thus, "absent evidence of the broadcaster's intent to advance a particular candidacy, the newsworthiness of an event is left to the reasonable news judgment of professionals." *Kennedy for President Committee v. FCC*, *supra*, 636 F.2d at 427. [3]

10. In our earlier decision, we had determined that neither of the formats proposed by King fit any of the exemption classes. As such, we did not address the second part of our analysis to determine whether the decision to broadcast the programming was an exercise of good faith news judgment. Upon reexamination, following applicable precedents in accordance with the court's remand, we now believe that both formats in King's proposed programming fit the Section 315(a)(4) "news event" exemption class. Having made that determination, we also apply the good faith analysis alluded to by the court and find that both the interview and candidate presentation formats should be exempt news event programs.

11. The back-to-back candidate presentations proposed by King, in our view, satisfy both parts of the Section 315(a)(4) analysis. First, the two candidate presentations, in which the major nominees for the highest office in the land set forth in speeches "their essential campaign message to the American people," reasonably may be viewed as news "events" subject to broadcast coverage within the meaning of the fourth exemption. We perceive no significant distinction between coverage of this sort of political "event" and the candidate debates we previously have deemed to be news "events." *Cf. Chisholm v. FCC*, 538 F.2d at 358 (presidential press conferences and debates are inherently newsworthy events under fourth exemption).

12. In this regard, and upon further reflection, we believe the mere fact that the presentations allow the candidates to present their views in the most favorable light, without spontaneous interaction with the press or opposing candidates, does not preclude application of the news event exemption, as the Bureau suggested in its earlier ruling in this case. Due to the absence of spontaneity, the Bureau believed instead that the events were more like candidate advertising. However, as the court noted in *Chisholm*, and as we emphasized in *Kennedy for President Committee*, it "is . . . reasonable to believe . . . that *any* appearance by a candidate on the broadcast media is designed, to the best of the candidate's ability, to serve his political ends." 77 FCC 2d 964, 968 n.8. For that reason, a candidate's motivation for participation in a particular event (that is, whether the participation is intended to enhance his or her candidacy) should not be determinative of whether the news event exemption applies. Similarly, we believe that whether or not the particular circumstances surrounding an event make it easier, or harder, for a candidate to achieve the objective of enhancing his candidacy is merely fortuitous and should not determine whether the program qualifies as

coverage of a news event. We conclude, therefore, that the back-to-back, spoken presentations of the two major presidential nominees' views, by any reasonable standard, are news "events" within the contemplation of the fourth exemption.

13. As to "newsworthiness," we also have no reason to doubt the reasonableness of a broadcaster's determination that these presentations are "newsworthy" events or to question the bona fides of a broadcaster's decisions to cover the presentations. For example, King's format for these segments contains structural safeguards that offer virtually no opportunity for broadcaster favoritism. By guaranteeing the equal, back-to-back appearance of both major party presidential candidates, with the order of presentation determined by coin toss and reversed in the second back-to-back presentation, the format precludes a broadcaster from airing these speeches for the purpose of aiding a candidate in a partisan, discriminatory fashion. *See Aspen Institute*, 55 FCC 2d 697, 707 (1975). We therefore conclude that the back-to-back presentations of major presidential candidates proposed by King satisfy both aspects of the relevant analysis and are within the fourth exemption.

14. The interview programs in the proposed series of programs are also exempt under the foregoing analysis. In these programs, each candidate would be subjected to a separate, forty-five minute interview by journalists-interviewers selected by the broadcaster and presented back-to-back. It is clear that because these interviews are not part of a regularly scheduled program they are not exempt under Section 315(a)(2). As the court in *King* noted, however, we have indicated that there are some program formats which could conceivably qualify for an exemption under either the Section 315(a)(2) exemption for bona fide news interviews or the exemption under Section 315(a)(4) for bona fide news events. *See Geller*, *supra* at 1244; *Aspen*, *supra*, at 708-712. Although King's interview format cannot comport with the news "interview" exemption, we believe it satisfies the Section 315(a)(4) news "event" analysis.

15. Interviews of the major competing presidential candidates reasonably may be viewed as news "events," using objective criteria, and we have no basis to question a broadcaster's bona fides in covering such events. As in the back-to-back candidate statements, we can perceive no persuasive distinction between these interviews and exempt candidates debates and, indeed, we suggested no distinction in our earlier ruling in this case. Furthermore, unlike traditional interview programming, which is subject to the Section 315(a)(2) exemption, here the broadcaster guarantees that both the major competing candidates will be interviewed and presented back-to-back. If a second interview is deemed necessary, the candidates' order of appearance in the program will be reversed. In a typical interview format, there can be no guarantee that competing candidates will be given precisely equal treatment. Hence, Congress specified the regularly scheduled requirement as an additional safeguard against broadcaster abuse for programs falling only under the news interview exemption. Nevertheless, as we noted in *Aspen*, *supra* at 207, "[r]ealistically the likelihood of broadcaster abuse is remote in the coverage of more prominent political users. . ." Where both of the major opposing candidates for president are interviewed pursuant to an unbiased format, the potential for favoritism in coverage is even more remote. Furthermore, the Section 315(a)(4) exemption is not contingent upon a broadcaster's control or lack thereof. *Geller*, *supra*, at 1245.

16. The proposal before us contemplates appearances by the two major party presidential nominees only. However, we believe that exclu on of a major third-party presidential candidate who, based on objective criteria such as polling results showed the significance of his or her campaign, would call into question the bona fides of the broadcaster's selection of candidates.[4]

17. In reaching the decision to grant King's request, we considered Congress' "willingness to take some risks with the equal time philosophy" to foster a more informed electorate when it enacted the news exemptions in 1959. *See Chisholm*, *supra* at 360. As the court stated in *Kennedy for President Committee*, *supra* at 423-24:

> The [news exemption] amendments became necessary, as we observed in *Chisholm*, "to enable what probably ha[d] become the most important medium of political information to give the news concerning political races to the greatest number of citizens, and to make it possible to cover the political news to the fullest degree." Thus, while reaffirming its belief that the central mission of Section 315(a) was to serve as a guaranty of equal treatment of candidates for political office, Congress concluded that this objective must be balanced against two others no less vital: encouraging maximum coverage of all news events - whether political or apolitical in nature - in order to cultivate a fully informed public, and preservation of licensees' traditional independent journalistic judgment with respect to broadcasting such events.

Grant of King's request, which presents no basis for questioning the licensee's bona fide news judgment, will further Congress' intent to permit broadcasters to make a fuller and more effective contribution to an informed electorate.

18. Accordingly, IT IS ORDERED that King's request for exemption from the equal opportunities requirements for its programming proposal under Section 315(a(4) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In the original Commission proceedings, the petitioner was WEBE-108 Radio Company (WEBE). King Broadcasting Company became a party when it filed a petition in support of WEBE's application for review. Since that time, WEBE has been transferred. WEBE did not seek court review of our action.

[2] In general, any broadcast of a candidate's voice or picture is a "use" of a station if the candidate's participation in the broadcast is such that he or she will be identified by members of the audience.

[3] *See also Henry Geller*, 95 FCC 2d at 1247, where we stated, "Section 315(a)(4) exemption encompasses news reports of any reasonably recent event intended in good faith by the broadcaster to inform the public and not intended to favor or disfavor any candidate".

[4] We emphasize here that the balanced nature of the program format, which includes structural safeguards for objective news coverage of political candidates, is critical to our assessment of the bona fides of a "news event" under Section 315(a)(4) in this case. We will carefully scrutinize any future requests for exemption pursuant to these standards. To the extent there is need for further clarification of the kind of objective structural criteria we might consider in allowing an exemption under Section 315(a)(4) in any similar future cases, we shall address such matters on a case-by-case basis.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-392

In the Matter of

Amendment of Section 73.202(b), RM-7234
Table of Allotments,
FM Broadcast Stations.
(Lometa, Texas)

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1991; Released: August 21, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Don Werlinger ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 5385 (1990), proposing the allotment of Channel 270A to Lometa, Texas, as that community's first local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 270A to Lometa, Texas, since it could provide the community with its first local FM service. Channel 270A can be allotted to Lometa in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.6 kilometers (2.3 miles) east to avoid a short-spacing to Station KQXT(FM), Channel 270C1, San Antonio, Texas.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 7, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lometa, Texas	270A

4. The window period for filing applications will open on **October 8, 1991,** and close on **November 7, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 654-6530.

[1] The coordinates for Channel 270A at Lometa are North Latitude 31-13-14 and West Longitude 98-21-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-241

In the Matter of

Amendment of Section 73.202(b), RM-7767
Table of Allotments,
FM Broadcast Stations.
(Topsail Beach, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 21, 1991

Comment Date: October 15, 1991
Reply Comment Date: October 30, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Topsail Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 280C3 for Channel 280A at Topsail Beach, North Carolina, and the modification of Station WZXS' construction permit to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 280C3 for Channel 280A at Topsail Beach, North Carolina, because it could provide the community with a wide coverage area FM service. Channel 280C3 can be allotted to Topsail Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.3 kilometers (13.3 miles) northeast to avoid short-spacings to the proposed allotment of Channel 279A or Channel 279C3 at Shallotte, North Carolina and Channel 283A to Wilmington, North Carolina (MM Dockets 89-326 and 89-327) and to accommodate petitioner's desired transmitter site. [1] As requested, we also propose to modify Station WZXS' construction permit to specify operation on Channel 280C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Topsail Beach or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Topsail Beach, North Carolina	280A	280C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 15, 1991,** and reply comments on or before **October 30, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stephen T. Yelverton, Esq.
Maupin Taylor Ellis & Adams, P.C.
1130 Connecticut Avenue, N.W., Suite 750
Washington, D.C. 20036-3904
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 280C3 at Topsail Beach are North Latitude 34-30-38 and West Longitude 77-28-45.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-242

In the Matter of

Amendment of Section 73.202(b), RM-7329
Table of Allotments,
FM Broadcast Stations.
(Bay City, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 21, 1991

Comment Date: October 15, 1991
Reply Comment Date: October 30, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sandlin Broadcasting Company, Inc. ("petitioner"), licensee of Station KMKS(FM), Channel 273C2, Bay City, Texas, requesting the substitution of Channel 273C1 for Channel 273C2 at Bay City, and the modification of Station KMKS(FM)'s license to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 273C1, if allotted to Bay City.

2. We believe the public interest would be served by proposing the substitution of Channel 273C1 for Channel 273C2 at Bay City, since it could enable Station KMKS(FM) to expand its coverage area. Channel 273C1 can be allotted to Bay City in compliance with the Commission's minimum distance separation requirements with a site restriction of 47.0 kilometers (29.2 miles) west of Bay City in order to avoid short-spacing conflicts with Station WKJQ(FM), Channel 271C, Houston, Texas, and the pending applications for the vacant but applied for Channel 273C2 at Beaumont, Texas. [1] As requested, we also propose to modify petitioner's license for Station KMKS(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 273C1 at Bay City or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bay City, Texas	221A, 273C	221A, 273C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 15, 1991,** and reply comments on or before **October 30, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Helen E. Disenhaus, Esq.
Swidler & Berlin
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-3851
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 654-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 273C1 at Bay City are North Latitude 29-06-00 and West Longitude 96-26-00.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-620

In the Matter of

Amendment of Section 73.202(b), RM-7125
Table of Allotments,
FM Broadcast Stations.
(Hayward, Wisconsin)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1991; Released: August 21, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the Petition for Reconsideration [1] filed by Pine-Aire Broadcasting Corporation, Inc. ("petitioner"), of the *Report and Order*, 5 FCC Rcd 5539 (1990), which dismissed its petition to substitute Channel 222C3 for Channel 221A at Hayward, Wisconsin, and modify the license for Station WRLS-FM accordingly. The petition was dismissed because, consistent with our policy and procedures as set forth in the *Appendix* to the *Notice*, the Commission did not receive supporting comments from the petitioner or any other party.

2. Petitioner indicates in the Petition for Reconsideration that due to an oversight on the part of its counsel, it did not resubmit to the Commission its pleading expressing its interest in the higher class channel at Hawyard. Petitioner contends that this failure does not reflect a lack of such intention on its part and now states that it has every intention of applying for the channel and if authorized, will promptly build a station at Hayward.

3. We believe that the public interest would be served by substituting Channel 222C3 for Channel 221A at Hayward, Wisconsin, since it would provide the community with its first wide coverage FM service. Inasmuch as the channel would have been allotted earlier had it not been for a lack of expression of interest, we believe that a reversal of our earlier decision is warranted. Had this been a contested proceeding, we may have not granted this petition for reconsideration. However, since this proceeding is uncontested, we do not believe that issuance of a new *Notice of Proposed Rule Making* would serve the public interest. Channel 222C3 can be allotted to Hayward, Wisconsin, in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner. [2] We have authorized a modification of petitioner's license for Station WRLS-FM, Hayward, to specify operation on Channel 222C3 in accordance with Section 1.420(g) of the Commission's Rules. Since Hayward is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 7, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below:

Community	Channel No.
Hayward, Wisconsin	222C3, 269A

5. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Pine-Aire Broadcasting Corporation, Inc., IS GRANTED.

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WRLS-FM, Hayward, Wisconsin, IS MODIFIED to specify operation on Channel 222C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public Notice was given on November 26, 1990, Report No. 1830.
[2] The coordinates for Channel 222C3 at Hayward are 46-06-47 and 91-20-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-243

In the Matter of

Amendment of Section 73.202(b), RM-7766
Table of Allotments,
FM Broadcast Stations.
(Rusk, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1991; Released: August 21, 1991

Comment Date: October 15, 1991
Reply Comment Date: October 30, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by E. H. Whitehead ("petitioner"), licensee of Station KWRW(FM), Channel 249A, Rusk, Texas, requesting the substitution of Channel 249C3 for Channel 249A at Rusk and modification of petitioner's license for Station KWRW(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 249C3, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 249C3 for Channel 249A at Rusk, since it could provide the community with a wide coverage area FM service. Channel 249C3 can be allotted to Rusk in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) south to accommodate petitioner's desired site. [1] In addition, this proposal is contingent upon Station KALK(FM) at Winfield, Texas, receiving a license to operate on Channel 249C2 in accordance with its outstanding construction permit (BPH-880923IG). Therefore, we shall not finalize this proceeding until the Winfield station is licensed accordingly.

3. As requested, we shall propose to modify the license of Station KWRW(FM) at Rusk, Texas, to specify operation on Channel 249C3 in lieu of Channel 249A in accordance with Section 1.420(g) of the Commission's Rules. We shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Rusk.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rusk, Texas	249A	249C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 15, 1991,** and reply comments on or before **October 30, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David M. Silverman, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 654-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 249C3 at Rusk are North Latitude 31-44-57 and West Longitude 95-09-26.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-8

In the Matter of

Television Satellite Stations
Review of Policy and Rules

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1991; Released: August 21, 1991

Comment Date: October 10, 1991
Reply Comment Date: October 25, 1991

By the Commission: Commissioner Barrett issuing a separate statement.

I. INTRODUCTION

1. The Commission recently released a *Report and Order* ("*R&O*") in the above-captioned proceeding, which refined the Commission's *ad hoc* method of evaluating television ("TV") satellite proposals by adopting a rebuttable presumption favoring applications that satisfy certain public interest criteria. [1] The Commission also decided to abolish both the limit on the amount of local programming that TV satellite stations can originate (formerly, 5%) and the use of that limit as a benchmark for determining when a station will lose its claim to satellite status.[2] In eliminating the 5% benchmark, however, we noted that such action raised questions about the continued advisability of exempting satellite stations from the limitations of the national multiple ownership rule. [3] Accordingly, we are now issuing a *Second Further Notice of Proposed Rule Making* ("*Second Further Notice*") to examine these questions.

II. BACKGROUND

2. The *R&O* focused on the most common TV satellite scenario: a licensee seeks permission to operate one television station as a satellite of another commonly owned "parent" television station, although such ownership would, absent grant of satellite status, violate the restrictions of the contour overlap rule. [4] We examined the circumstances that would justify such operation and identified three public interest criteria that together would give rise to a presumption that satellite operation was in the public interest. [5] We did not, however, specifically evaluate the impact that the new satellite authorization process might have on the policy considerations that underlie our national multiple ownership rule. As noted above, we therefore indicated that we would review whether the changes in our satellite policy warranted amendment or elimination of the current satellite exemption from the national multiple ownership rule. [6]

III. DISCUSSION

3. Our primary goal in seeking comment with this *Second Further Notice* is to examine whether a station that qualifies as a satellite, and is therefore exempt from the contour overlap rule, should continue to be exempt from the national multiple ownership restrictions as well. When we adopted the current national multiple ownership limits, we stated, without any extensive discussion, that "[b]roadcast facilities operating primarily as terrestrial satellite television stations will be exempt from both the numerical and audience reach limits" of the national multiple ownership rule." [7] The rationale for this satellite exemption was that satellite stations primarily rebroadcast the programming of parent stations rather than originate programming., [8] In the *R&O* in this proceeding, however, we lifted the origination limit for satellites, thus allowing these stations to originate as much programming as they see fit. We therefore seek comment on whether there remains any reason to continue exempting satellites from the national multiple ownership rule.

4. One possible rationale for preserving the exemption is implicit in the *R&O*. Grant of a satellite application typically means that an underserved market will be obtaining an additional service it would not otherwise receive. If such an application is denied solely because the applicant owns 12 stations, presumably no other prospective station owner would stand ready to come forward and serve the market. [9] Under these circumstances, it appears

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[1] *Report and Order* in MM Docket No. 87-8, FCC 91-182 (released July 8, 1991). *See also* 47 C.F.R. § 73.3555, Note 5.

[2] *R&O* at paras. 23-25. We held that when a licensee applies for permission to transfer or assign a parent-satellite combination, we would use the grounds set forth in the *R&O* for evaluating whether the satellite is entitled to retain satellite status. *See id.* at para. 24.

[3] *Id.* at para. 24. *See also* 47 C.F.R. § 73.3555(d) & Note 5.

[4] The contour overlap rule, commonly known as the "duopoly" rule, prohibits a licensee from owning, *inter alia*, two television stations with overlapping Grade B contours. *See* 47 C.F.R. § 73.3555(a).

[5] The three criteria are: (1) there is no City Grade overlap between the parent and the satellite, (2) the proposed satellite would provide service to an underserved area, and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. *See R&O* at para. 1.

[6] With respect to television, the national multiple ownership rule limits the number of TV stations that can be owned nationally to either 12 or 14, and the national audience reach percentage of all owned TV stations to either 25 or 30 percent, depending on whether or not at least two of the stations are minority owned. *See* 47 C.F.R. § 73.3555(d).

[7] *Memorandum Opinion and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 74, 97 (1985) ["*National Multiple Ownership MO&O* "], *recon. dismissed*, 5 FCC Rcd 5338 (1990), *appeal dismissed sub nom. National Association of Black Owned Broadcasters v. FCC and USA*, No. 85-1139 (D.C. Cir. Jan. 4, 1991).

[8] *See National Multiple Ownership MO&O*, 100 FCC 2d at 90 n. 43.

[9] Under the scenario set forth above, the applicant will have

that counting the satellite against the licensee's national ownership limit would not serve the public interest. The question we would initially ask commenters to address therefore is whether there would be some point at which the benefits to the public of additional satellite stations (rather than no additional stations at all) would be outweighed by competing considerations. At the same time, commenters should address whether allowing ownership of satellite stations without a national ownership cap of some sort would reduce opportunities particularly for small entrepreneurs and new entrants to the industry.[10] If TV satellite stations were to be subject to a national multiple ownership rule, should we grandfather existing licensees that would otherwise be operating in violation of this rule? Finally, would some national ownership benchmark other than the number of stations be preferable to apply to TV satellite stations?

IV. CONCLUSION

5. In the *R&O*, we devised a more predictable and efficient approach to evaluating proposals for TV satellite waivers to the contour overlap rule. In this *Second Further Notice*, we have raised questions about the relationship between satellite status and our national multiple ownership rule. Accordingly, we seek comment to determine the role that TV satellite status should play in applying this other rule.

V. PROCEDURAL MATTERS

6. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

7. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **October 10, 1991**, and reply comments on or before **October 25, 1991**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

8. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA), set forth in the Appendix, of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Second Further Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Second Further Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

9. For additional information on this proceeding, contact David E. Horowitz or Kathleen O'Brien Ham, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. **Reason for the Action**: This action is instituted to seek comment on refinements to the Commission's television satellite policy. Specifically, we propose to determine whether satellite status should continue to exempt TV satellites from the national multiple ownership rule.

2. **Objective of this Action**: Our objective in this action is to reexamine the satellite exception to the national multiple ownership rule, in light of the changes to our approach toward satellites set forth in the *R&O*.

3. **Legal Basis**: Authority for the actions proposed in this *Second Further Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

4. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule**: There is no additional impact.

5. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule**: None.

6. **Description, Potential Impact and Number of Small Entities Involved**: The entities affected will be television broadcast licensees whose satellite operations now, or in

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met the three criteria of the presumption test adopted in the *R&O*. Thus, under the third criterion, there would be no alternative operator (without multiple ownership conflicts) ready and able to construct or operate the satellite as a full-service station. *See R&O* at para. 20.

[10] In this regard, commenters also should address the type of showing required to satisfy the third presumption criterion in the *Report and Order*. Specifically, how should we assess the adequacy of notice to the public regarding station availability? To the extent satellite stations are not counted toward the national ownership limits, is there a need to mandate public notice requirements of station availability beyond the local market? *See also supra* note 9.

the future may, present a conflict with the restrictions set forth in Section 73.3555(d) of our Rules. All broadcasters, including small entities, could benefit from the approach resulting from this *Second Further Notice*.

7. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives**: None.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Title: In the Matter of Television Satellite Stations; Review of Policy and Rules (MM Docket No. 87-8)

I support this Second Further Notice of Proposed Rule Making to examine the relationship between satellite status and the nationwide multiple ownership rule. I write separately to encourage interested parties to address the impact on small entrepreneurs and new entrants of the changes to our TV satellite rules. To the extent TV satellite stations no longer have local programming restrictions, I am concerned that such stations could be annexed as "pseudo full-service" stations under a regional or national ownership umbrella. Thus, I would hope that commenters will address the implications of this new rule for the future of our diverse broadcast ownership structure. Also, to the extent that TV satellite stations presently are not counted toward the national ownership limits, should there be heightened concern about the showings required to satisfy the three presumption criteria in our Report and Order?[1] In particular, with respect to the third TV satellite presumption, I question whether there is a need to ensure that notice of station sale/availability is sufficiently made to all eligible buyers, both within and outside the local market. I would hope that commenters in this proceeding address these and other concerns affecting small entrepreneurs and new entrants.

[1] See, Second Further Notice at 2, n. 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

"Memories. .. Then and Now"

Request for waiver or clarification
of Section 73.658(k) of the Commission's
Rules filed by LBS Communications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1991; Released: August 5, 1991

By the Chief, Mass Media Bureau:

1. The Commission has received a petition, dated July 16, 1991, from LBS Communications, Inc. ("LBS"), requesting various waivers or clarification of the Commission's prime time access rule (Section 73.658(k)). The requested action is intended to permit "Memories. .. Then and Now", a program produced by NBC News Productions, Inc. and syndicated by LBS, not to be deemed a network program and to permit its broadcast on network affiliated stations during the prime time access period. without being considered a network program.

2. "Memories. .. Then and Now" is described as a half-hour, weekly program consisting of public interest commentary from two on-air hosts interspersed with historic film footage. LBS and NBC consider the program to be a documentary non-entertainment program. The program is ordinarily broadcast by NBC owned and operated stations as well as affiliated stations of all three major networks on Saturdays, usually during prime time access hours. More than 130 stations are said to have carried the program during the 1990-1991 broadcast season. LBS states that, prior to the Commission's *Report and Order in Docket 90-162,* 6 FCC Rcd 3094 (1991), it reasonably believed "Memories. .. Then and Now" was not a network program for purposes of the prime time access rule. LBS further claims that, because "Memories. .. Then and Now" is a documentary non-entertainment program, it is unclear whether it is covered under paragraph 144 of that *Report and Order* as a program subject to the prime time access limitations. LBS seeks a clarification or waiver so that it may continue to syndicate the program for use during the access period.

3. Based on the "grandfathering" and transitional rules adopted in connection with other aspects of the Docket 90-162 *Report and Order,* LBS urges that it would be reasonable for the Commission to grant LBS grandfathered status with respect to this program and to treat the program in the manner of a program distributed by an entity prior to its becoming a network, citing Note 3 to Section 73.658(k). Finally, it is noted that there are few other programs that fall into the same category.

4. In its *Report and Order,* the Commission clarified that it did not intend to modify the prime time access rules. To the extent that LBS questions the scope or full meaning of the interpretation of Section 73.658(k) set forth in the *Report and Order in Docket 90-162,* these issues are more appropriately resolved in the pending reconsideration of that proceeding. Nevertheless, it is evident from the Commission's treatment of related issues in the *Report and Order* that the Commission did not intend the actions taken therein to adversely affect syndication arrangements already entered into based on what individual parties believed in good faith to be generally accepted interpretations of the existing rules. Therefore, consistent with the intent of the Commission's *Report and Order* and in light of what we understand will be the isolated nature of this situation, we find it appropriate to grandfather the ability of stations subject to the prime time access rules to broadcast "Memories. .. Then and Now" in the access period.

5. Accordingly, IT IS ORDERED, That the request for waiver regarding "Memories. .. Then and Now" filed by LBS Communications, Inc. on July 16, 1991 IS GRANTED to the extent indicated above and is otherwise DENIED.

6. This action is taken by the Chief, Mass Media Bureau under authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

"Studio 22"

Request for waiver of Section 73.658(k)
of the Commission's rules by John Blair
Communications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1991; Released: August 5, 1991

By the Chief, Mass Media Bureau:

1. The Commission has received a petition, dated July 22, 1991, from John Blair Communications, Inc. ("Blair"), requesting a waiver of the Commission's prime time access rule (Section 73.658(k)). The waiver is requested in order to permit "Studio 22", a program produced by a CBS-owned television station and syndicated by Blair, to not be deemed a network program and to permit its broadcast on network affiliated stations during the prime time access period.

2. "Studio 22" is originated at KCBS in Los Angeles and is described as a weekly program dealing with news concerning the entertainment industry. Blair indicates that it has been syndicating the program since January 1991 and that it has already been sold in 77 markets representing 63 percent of U.S. television households. Blair represents that when it acquired the syndication rights to "Studio 22" it expected that the program would be aired in the "access period," as had been the past practice for similar programming ventures. Further, Blair represents that it reasonably believed that "Studio 22" would not be considered a network program for purposes of the prime time access rule. Blair seeks a waiver so that it may continue to syndicate the program on that basis.

3. Based on the extensive discussion of "grandfathering" in connection with other aspects of the Docket 90-162 *Report and Order*, Blair urges that the Commission did not intend its new policies to have an adverse effect on existing programs. Finally, it is noted that there appear to be few other shows similarly situated.

4. It is evident from the Commission's treatment of related issues in the *Report and Order in Docket 90-162*, 6 FCC Rcd 3094 (1991), that, as Blair has noted, the Commission did not intend the actions taken therein to adversely affect syndication arrangements already entered into based on what individual parties believed in good faith to be generally accepted interpretations of the existing rules. Accordingly, consistent with the intent of the Commission's *Report and Order* and in light of what we understand to be the isolated nature of this situation, we find it appropriate to grandfather the ability of stations subject to the prime time access rule to broadcast "Studio 22" in the access period.

5. Accordingly, IT IS ORDERED, That the petition regarding "Studio 22" filed by John Blair Communication, Inc. on July 22, 1991 IS GRANTED on the basis set forth above.

6. This action is taken by the Chief, Mass Media Bureau under authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 16, 1991

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS

Comments are invited on proposed depreciation rates and amortizations for 16 local exchange carriers (LECs) and AT&T. The proposed rates for 13 of the LECs and AT&T were developed in conjunction with the Commission's standard review procedures, and, as such, reflect a thorough review of all depreciable telephone plant accounts. The proposed rates for three LECs were developed in conjunction with the Commission's streamlined annual update procedures.

The rates under consideration for the LECs are represented by the proposed expenses and composite rates shown on the Attachment. This Attachment also lists the affected carriers and jurisdictions, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations) and the percentage change in expenses (proposed vs. current). The current and proposed changes in expenses and rates for AT&T are as follows:

Current Expense = $2,324 million

Current Rate = 10.8%

Proposed Expense=$3,079 million

Proposed Rate= 14.3%

Change in Expense =$755 million

Each of the 17 carriers submitted studies to the Commission in support of its proposed depreciation rates. The Commission's staff and the staffs of the state public utility commissions having jurisdiction over the carriers reviewed the carriers' submissions. The carriers' studies and the corresponding staff reviews were discussed in correspondence, telephone conversations, and/or conferences. Each of the carriers thereafter formally filed updated studies which contained the data required by Section 43.43 of the Commission's rules. After considering all this information, the Bureau staff is recommending the life, salvage, and curve shape parameters which underlie the expenses and composite rates shown above and on the Attachment. These expenses are estimated annual amounts and may not reflect actual expenses because January 1, 1991 plant balances are used and the proposed rates may not be applicable for the entire year.

The carriers have requested effective dates ranging from January 1, 1991 to January 1, 1992. In the *1990 Depreciation Rates Order*, 6 FCC Rcd 750 (1991), the Commission decided that new depreciation rates shall be effective January 1 of the study year, beginning in 1991. The Commission is considering in a separate proceeding several petitions for reconsideration of that decision. The question whether carriers will be permitted effective dates other than January 1, 1991, will be decided in the reconsideration proceeding.

Copies of the carriers' initial 1991 depreciation rate study submissions, the preliminary review of these submissions, the 1991 annual update depreciation rate study submissions, the rate filings and other data supporting the proposed rates are available for publicinspection in Suite 257, 2000 L Street N.W., Washington, D.C. Copying facilities are available in Suite 812, 2000 L Street. Copies are also available from the Downtown Copy Center, Suite 246, 1919 M Street, N. W. Washington, D.C.

Parties wishing to file comments on the proposals summarized herein may do so by September 6, 1991. Replies may be filed by September 20, 1991. Comments and reply comments should include in the caption a reference to file no. AAD 91-50. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

ATTACHMENT

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION
LOCAL EXCHANGE CARRIERS

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Percent	Expense	Percent	Expense	Percent
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
FULL REVIEW:							
CINCINNATI BELL							
Kentucky	202,115	12,634	6.3	13,974	6.9	1,340	10.6
Ohio	972,100	65,521	6.7	73,456	7.6	7,935	12.1
CITIZENS OF CALIFORNIA	215,457	11,722	5.4	13,242	6.1	1,520	13.0
CONTEL OF CALIFORNIA	662,063	48,610	7.3	47,061	7.1	(1,549)	-3.2
CONTEL OF NEW YORK	440,221	26,469	6.0	30,982	7.0	4,513	17.1
DIAMOND STATE	571,161	37,522	6.6	41,127	7.2	3,605	9.6
GTE NORTH							
Illinois	1,065,871	60,187	5.6	64,183	6.0	3,996	6.6
Michigan	1,075,899	69,922	6.5	69,111	6.4	(811)	-1.2
Minnesota	7,462	406	5.4	438	5.9	32	7.9
Missouri	174,800	12,401	7.1	13,284	7.6	883	7.1
GTE NORTHWEST							
Idaho	228,072	16,701	7.3	17,938	7.9	1,237	7.4
Oregon	552,516	35,549	6.4	39,245	7.1	3,696	10.4
Washington	1,272,205	85,760	6.7	87,454	6.9	1,694	2.0
GTE SOUTH							
Kentucky	785,967	56,988	7.3	62,845	8.0	5,857	10.3
North Carolina	370,971	26,616	7.2	25,416	6.9	(1,200)	-4.5
West Virginia	159,371	10,057	6.3	11,604	7.3	1,547	15.4
ILLINOIS BELL	7,369,561	470,996	6.4	474,918	6.4	3,922	0.8
NEVADA BELL	406,096	25,558	6.3	26,593	6.5	1,035	4.0
NEW JERSEY BELL	7,094,066	500,036	7.0	563,905	7.9	63,869	12.8
PACIFIC BELL	21,713,158	1,621,739	7.5	1,644,988	7.6	23,249	1.4
USWEST COMMUNICATIONS							
Arizona	3,124,503	210,669	6.7	228,450	7.3	17,781	8.4
Colorado	3,874,096	279,699	7.2	281,334	7.3	1,635	0.6
Idaho	633,798	40,118	6.3	43,757	6.9	3,639	9.1
Montana	652,578	43,913	6.7	45,537	7.0	1,624	3.7
New Mexico	1,274,839	107,701	8.4	107,727	8.5	26	0.0
Utah	1,394,599	100,034	7.2	91,357	6.6	(8,677)	-8.7
Wyoming	654,596	39,884	6.1	41,835	6.4	1,951	4.9
ANNUAL UPDATE REVIEW:							
BELL OF PENNSYLVANIA	7,473,515	518,919	6.9	522,626	7.0	3,707	0.7
C&P OF WEST VIRGINIA	1,350,931	111,469	8.3	112,390	8.3	921	0.8
GTE SOUTH - Virginia	63,035	3,842	6.1	3,784	6.0	(58)	-1.5
TOTAL	65,835,622	4,651,642	7.1	4,800,561	7.3	148,919	3.2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy Regarding Character
Qualifications in Broadcast
Licensing

Amendment of Part 1, the Rules
of Practice and Procedure,
Relating to Written Responses
to Commission Inquiries and the
Making of Misrepresentations to
the Commission by Applicants,
Permittees, and Licensees, and
the Reporting of Information
Regarding Character Qualifications

ERRATA

Released: August 16, 1991

By the General Counsel:

1. By *Order* adopted July 31, 1991, released August 1, 1991 (FCC 91-244), the Commission granted, in part, three petitions for stay of broadcast character reporting requirements imposed in this proceeding. *See Policy Statement and Order* (the *1990 Character Policy Statement)*, 5 FCC Rcd 3252, 55 Fed. Reg. 23082 (1990), *reconsideration granted in part*, 6 FCC Rcd 3448, 56 Fed. Reg. 25633 (1991) (the *1991 Character Reconsideration Order*). However, the reporting requirements that were the subject of that *Order* had been imposed in the *1990 Character Policy Statement* and therefore were in effect at the time the stay was requested. In these circumstances, the proper procedural vehicle for granting, in part, the relief requested by petitioners is a suspension of the reporting requirements.

2. Accordingly, IT IS ORDERED that the *Order* (FCC 91-244) IS MODIFIED TO SUSPEND rather than stay the reporting requirements imposed in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

Willie A. Jefferson d/b/a OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS, L.P.	File No. BPH-870820MH
INNOVATIVE WOMEN'S MEDIA ASSOCIATION	File No. BPH-870820MQ
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction Permit for New FM Station, Channel 275C2, Shreveport, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1991; Released: August 23, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. By *Order*, FCC 91M-1859, released June 11, 1991, Administrative Law Judge Edward Luton (ALJ) dismissed the application of Innovative Women's Media Association (Innovative) from this proceeding for failure to prosecute because Innovative (1) failed to exchange its direct written case on the date ordered by the ALJ, and (2) failed to make available for deposition a key witness who had been properly noticed by the competing applicants. Innovative filed an Appeal of the ALJ's ruling with the Board on June 18, 1991. Oppositions were filed on June 28, 1991, by Caddo Broadcasting Limited Partnership (Caddo) and NTW, Inc. (NTW), respectively. We affirm the ALJ's ruling, which is fully supported by the record and controlling Commission precedent. *See e.g. H.S. Communications, Inc.*, 6 FCC Rcd 3609 (Rev. Bd. 1991), and note 3 below.

BACKGROUND

2. On March 12, 1991, real party-in-interest, financial qualifications, and false financial certification issues were added against Innovative by the Review Board in a remand *Memorandum Opinion and Order*, 6 FCC Rcd 1499 (Rev. Bd. 1991), based on allegations regarding Innovative's putative limited partner, Kent S. Foster. Following remand, the ALJ ordered the parties to complete their discovery and exchange direct case exhibits on May 21, 1991, so that witnesses could be notified on May 28, 1991, and the hearing could commence on June 11, 1991. *See Memorandum Opinion and Order*, FCC 91M-1015, released March 20, 1991.

3. Innovative did not comply with any of these requirements, and on May 22, 1991, through "special counsel," filed a Motion for Suspension of All Procedural Dates and Request for Prehearing Conference. This request was based upon the claim that its former counsel had "officially" withdrawn on May 6, 1991, and that its principal had not learned until May 22 that the written testimony was due on May 21, 1991; moreover, Innovative acknowledged that some seventy days following remand it had not yet even begun to prepare its written case regarding its own basic qualifications.

4. On May 23, 1991, three of Innovative's competitors, NTW, Caddo, and Opportunity Broadcasting of Shreveport, filed a joint motion seeking the dismissal of Innovative's application for failure to prosecute. They noted that Innovative had not made Foster, a key witness, available for deposition on the dates noticed and agreed upon by all the parties,[1] nor had it exchanged its direct written exhibits by the date established by the ALJ (May 21, 1991).

5. Innovative's response to the joint motion attributed its faults to the alleged "abrupt" withdrawal of counsel, and subsequent difficulties in securing new counsel. However, the declaration of Innovative's own general partner, Mavice C. Wallette, established that:

> In the early or middle part of April, 1991, [Counsel] informed me that he anticipated the possibility that he might have to withdraw as counsel for Innovative in the Shreveport, Louisiana FM Proceeding . . . . [Counsel] advised us that he *ceased representing Innovative on April 24, 1991*, and he notified the Commission of this fact on May 6, 1991.

Statement of Mavice C. Wallette (p. 1; emphasis added). Regarding the direct case testimony, Wallette further declared that:

> With a letter of March 25, 1991 [Counsel] sent me a copy of the presiding Judge's Order dated March 20, 1991, which established various procedural dates in the case. I distinctly recall seeing the June 11, 1991 hearing commencement date in the Order, but I do not recall ever seeing or focusing on the May 21, 1991 date established for the exchange of written testimony in the case . . . On May 22, 1991 . . . I first became aware of the important May 21 deadline for the exchange of written exhibits.

Id., p. 3.

6. In his dismissal order, FCC 91M-1859, *supra*, the ALJ found that:

> Innovative was required to serve its direct case testimony on May 21, 1991, but it still has not done so . . . . The opposing parties made three unsuccessful attempts to depose Innovative's Mr. Kent S. Foster

(on May 7, May 8 and May 16, 1991); Innovative did not produce Mr. Foster so that he could be examined.

After determining that Innovative had failed to demonstrate sufficient cause for suspension of the established procedural dates, the ALJ granted the joint motion and dismissed Innovative's application for failure to prosecute.

7. On Appeal, Innovative argues that counsel's "formal" and "abrupt" resignation left it with little time to retain new counsel, and that this encumbrance was aggravated by the "unusual" conflict problem confronting Innovative due to Foster's simultaneous involvement in a large number of multiparty comparative broadcast proceedings. Innovative also attempts to excuse its failure to file a timely request for extension of the filing date to the fact that none of its principals allegedly "actually" became aware of the filing date until May 22, 1991.

DISCUSSION

8. It is well established that ALJs have broad discretion to regulate the course of multiparty comparative hearings. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). That discretion must be reasonably exercised, and prehearing requirements are not to be "wielded with Draconian, mechanical, or insensitive finality." *Pan American Broadcasting Co.*, 89 FCC 2d 167, 170 (Rev. Bd. 1982). In *Pan American*, we observed that dismissals of applications for noncompliance with procedural requirements require "the striking of a balance between the need of the Commission to protect the integrity of its procedures and administrative techniques in view of its limited resources, and the public interest in seeing that scarce broadcast facilities go to the best qualified applicant." *Id.*, at 171. Subsequently, however, in *Hillebrand*, the Commission tempered the weight accorded the second prong above, warning that it would no longer "indulge" "applicants' temporizing activities." 1 FCC Rcd at 419. It announced that it was placing "greater emphasis on [its] responsibility to provide service to the public in the most efficient, expeditious manner possible and . . . that delaying the initiation of new service disserves the public interest," *id.*, and explicitly held that "prosecution of an application means timely compliance with procedural and substantive rules." *Id.*[2]

9. The factors appropriate for consideration in reviewing the dismissal of an application from a comparative hearing are set forth in *Comuni - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1539 (1989). Those factors are: (1) the applicant's proffered justification for the failure to comply with the presiding officer's ruling; (2) the prejudice suffered by other parties; (3) the burden placed on the administrative system; and (4) the need to punish abuse of the system and to deter future misconduct. The ALJ's ruling is consistent with *Comuni - Centre*.

10. First, Innovative's attempt to place the blame on counsel's "abrupt" withdrawal for its noncompliance is at odds with Wallette's own admission in her declaration (*see* para. 5, *supra)* that she was informed "in the early or middle part of April" that counsel might have to withdraw, and that counsel did, in fact, withdraw his representation of Innovative on April 24, 1991 (nearly one full month prior to the established direct case filing date). Although Innovative asserts that its principals were not "aware" of the filing date for the direct case exhibits, the record also establishes that the applicant had *actual* notice of those dates because, as Wallette admits (*see* para. 5, *supra)*, the general partners received a copy of the ALJ's *Order* specifying the critical dates. *See generally RKO General, Inc.*, 102 FCC 2d 1417, 1419 (Rev. Bd. 1985)(dismissal of application for lack of prosecution upheld because ALJ's orders were customarily mailed to applicant). Moreover, the Commission has recently repeated that an applicant is responsible for "the failings of counsel," so that even if counsel had actually been to blame for the particular defaults in this case, Innovative's application might have been dismissed. *See Carol Sue Bowman*, FCC 91-237, released August 6, 1991.

11. Second, both the public and the parties would be prejudiced by reinstatement of Innovative's application because the initiation of a new FM service to Shreveport, and the opportunity to provide that service, would be further delayed in selecting the winning applicant. Third, Innovative's faults have already placed an unacceptable burden on the proceeding because they have completely frustrated the ALJ's efforts to expeditiously start the hearing some three months after remand on Innovative's basic qualifications. In sum, the ALJ's ruling is fully consistent with past Review Board and Commission precedent.[3]

12. ACCORDINGLY, IT IS ORDERED, That the Appeal filed June 18, 1991 by Innovative Women's Media Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTES

[1] We reject out of hand the excuse that appellant's "limited" partner, who refused to be deposed, was allegedly unaware of counsel's prior withdrawal until the day before deposition. Responsibility for an application falls directly upon "general" partners, as "limited" partners are supposed to be merely "passive investors." *See generally Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991). That appellant's "general" partner failed to advise its "limited" partner of withdrawal of counsel two weeks prior thereto is a telling point as to appellant's mode of proceeding with its remand issue.

[2] The Commission has also recently reiterated that delay in the conduct of comparative hearings and agency review among otherwise qualified applicants deprives the public of a valued service as well as the ultimate licensee from the opportunity to provide that service. *Report and Order in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1990), *modified on recon.*, 6 FCC Rcd 3403 (1991). Accordingly, it proposed "a number of procedural and organizational strategies intended to reduce the amount of time consumed by the process." 6 FCC Rcd at 157. One of the stated objectives is that comparative cases should be resolved by an initial decision within nine months of the hearing designation order. 6 FCC Rcd at 162. Cases after July 31, 1991, are governed by the strict and specific deadlines mandated by the new Commission practice. The present case was governed by the ALJ's March 20 prehearing order.

[3] *See H.S. Communications, Inc., supra* (upholding ALJ's ruling dismissing application for failure to exchange direct case, and for failure of a principal to appear at deposition); *Classic Vision, Inc.*, 104 FCC 2d 1271 (Rev. Bd. 1986) (delay in obtaining new counsel no excuse for not responding to outstanding motions where applicant was aware of the state of affairs), *review denied*, 2 FCC Rcd 2376 (1987). *See also Mark A. Perry*, 4 FCC Rcd 6500, 6502-03 (Rev. Bd. 1989); *William E. Benns, IV*, 6 FCC Rcd 2322 (Rev. Bd. 1991) (appeal denied where applicant did not comply with discovery orders); *Josie FM Limited Partnership*, 6 FCC Rcd 891 (Rev. Bd. 1991) (failure to produce documents and witnesses); *Lorraine Walker Arms*, 5 FCC Rcd 3426 (Rev. Bd. 1990), *rev. denied*, 5 FCC Rcd 7013 (1990) (failure to produce witness at hearing); *Carroll, Carroll & Rowland*, 4 FCC Rcd 7149 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2430 (1990) (failure to go forward with discovery); *Carol Sue Bowman*, 6 FCC Rcd 10, 12 (Rev. Bd. 1991) (applicant dismissed for failure to produce documents), *rev. denied*, FCC 91-237, released August 6, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

SBM COMMUNICATIONS, INC.	File No. BPH-880816MM
HEIDI DAMSKY	File No. BPH-880816MW
GEORGE W. BARBER, JR.	File No. BPH-880816MY
GEORGE I. O'REAR	File No. BPH-880816NL
WEDA, LTD.	File No. BPH-880816NR
Willie Huff, Deborah Huff and Adrienne E. Lee, A Partnership, d/b/a HOMEWOOD PARTNERS	File No. BPH-880816NU
HOMEWOOD COMMUNITY BROADCASTERS, LTD.	File No. BPH-880816OQ

For Construction Permit for
New FM Station, Channel 247A,
Homewood, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1991; Released: August 23, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Board has before it a pleading styled "Joint Petition For Extraordinary Relief, Waiver And Approval Of Universal Settlement And Stay of Procedural Dates" filed on August 15, 1991. Because the Joint Petition contemplates a universal settlement of the above-captioned proceeding, no opposition is anticipated.

2. The parties appeal a *Memorandum Opinion and Order*, issued August 14, 1991 (FCC 91M-2552, released August 16, 1991) by ALJ Joseph Chachkin, denying similar relief and a waiver of Section 73.3525 of the Commission's Rules.[1] That rule, which now limits settlement consideration to legitimate and prudent expenses incurred in the prosecution of a broadcast application, became applicable to any settlement agreement tendered after July 31, 1991. *Amendment of Section 73. 3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 2901 (1991). Here, the petitioners filed their settlement agreement on August 1, 1991 (one day late), and the ALJ denied a requested waiver of the rule to permit an unlimited monetary settlement, and refused to suspend procedural dates for the scheduled comparative hearing.

3. The Joint Petition before the Board does not deny the applicability of the new Section 73.3525, nor that the settlement exceeds the monetary limits established therein. Rather, citing *Rebecca Radio of Marco*, 3 FCC Rcd 2256 (Rev. Bd. 1988), the parties seek a stay of the hearing's procedural dates set by the ALJ, contending that "[c]ontinued litigation herein will undo the universal settlement that has been achieved." Joint Petition at 3.

DISCUSSION

4. We must deny the Joint Petition in all respects. As the ALJ observed, the monetary limits set forth in the new Section 73.3525, intended to curb the rampant "profiteering" in broadcast applications, were originally adopted in December 1990, and slated to become effective on March 21, 1991. *Report and Order*, 6 FCC Rcd 85 (1990). Though it later deferred the effective date of the new settlement rule, the Commission announced on May 15, 1991 that July 31 was to be the last date on which unlimited settlement agreements would be accepted.

5. The Board has no policy-making authority.[2] Whereas the Board does grant waivers of the rules where policy as to the criteria for waivers has been established by the Commission, *see, e. g., Naguabo Broadcasting Co.*, 6 FCC Rcd 912 (Rev. Bd. 1991),[3] the Commission has annunciated no policy whatever for a waiver of Section 73.3525, and this seems to be a case of first impression. It would be presumptuous of the Board, therefore, to erase on its own the Commission's *twice* -considered deadline for unlimited monetary settlements. Unless and until the Commission rules otherwise, the Board will assume that the Commission's policy on settlements is firmly embedded in its own stated deadline.[4]

6. ACCORDINGLY, IT IS ORDERED, That the "Joint Petition for Extraordinary Relief, Waiver and Approval of Universal Settlement and Stay of Procedural Dates" filed by the captioned parties on August 15, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The parties were advised of the ALJ's ruling by telephone conference of August 13, 1991. Joint Petition at 3. Because the exchange of direct case exhibits is currently scheduled for August 23 by the ALJ, we are making available to the parties pre-publication copies of the Board's instant ruling.

[2] *See Horne Industries, Inc.*, 91 FCC 2d 1193, 1196 (Rev. Bd. 1982).

[3] Petitioners cite *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), for the proposition that waiver requests must be given serious consideration. We surely appreciate the court's holding, but we are also aware of the court's injunction in *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), that waivers should be granted upon standards clear-

ly set out by the agency. As this appears to be a case of first impression, no waiver standards have been developed by the agency for the Board to apply. *Compare Naguabo Broadcasting Co.*, supra (waivers granted as consistent with Commission waiver policy), *aff'd in pertinent part*, FCC 91-258, released August 15, 1991. Moreover, the only "public interest" ground advanced by petitioners for a waiver of the deadline for unlimited settlements is that its settlement is more expedient than a hearing. But were the Board to accept that rationale in this case, the precedent would obviously eviscerate the rule itself and its intended purpose.

[4] *Rebecca Radio*, relied upon by petitioners for a stay of procedural dates, is not controlling. It is true that, facing a novel policy question of first impression over the legality of a "white knight" settlement, the Board there granted a temporary stay of the hearing to permit the parties to attempt a settlement. *See* 3 FCC Rcd at 2257. (Indeed, so uncertain was the Commission's "white knight" policy that the Commission itself granted the settlement initially, *see* 4 FCC Rcd 830 (1989), but later reversed itself, *see* 5 FCC Rcd 937 (1990), and finally denied reconsideration, *see* 5 FCC Rcd 2913 (1990)). Unlike *Rebecca Radio*, where the Commission's basic policy was completely unclear, its unlimited settlement policy is crystalline and expressed with finite precision in its July 31, 1991 deadline.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY
WDIX, Yadkinville, North Carolina
File No. BP-870331BK

For a Construction Permit
For a Modification of Facilities

TRIAD NETWORK, INC.
Greensboro, North Carolina
File No. BP-870928AA

For a Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1991; Released: August 23, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Board has before it the Appeal of Robert C. Rickenbacker, filed August 2, 1991, from the *Memorandum Opinion and Order*, FCC 91M-2337 (*MO & O*), released July 30, 1991 by ALJ Edward J. Kuhlmann, denying Rickenbacker's request to intervene as a separate party in this proceeding. The Appeal has no opposition.

BACKGROUND

2. Shortly after the Board adopted its *Decision*, 6 FCC Rcd 1527 (Rev. Bd. 1991), awarding the Construction Permit at contest to Palmetto under the tenets of Section 307(b) of the Communications Act ("fair, efficient and equitable distribution of radio service"), 47 U.S.C. § 307(b), it was presented with a Motion to Reopen the Record and Enlarge the Issues filed by Triad Network, in which motion Triad alleged that one (of two) of Palmetto's officially reported 50% general partners, Robert C. Rickenbacker, was not in fact a Palmetto partner at all. *See Memorandum Opinion and Order*, 6 FCC Rcd 2193 (Rev. Bd. 1991) (*Remand Order*). Triad's motion was supported, *inter alia*, by Rickenbacker's own affidavit averring that he had actually withdrawn as a Palmetto partner in December 1989. Palmetto disputed Rickenbacker's claims, and asserted that, by operation of state law, he remained nonetheless a Palmetto partner. In view of the evidence before it, the Board remanded the case to the ALJ on issues to determine: (1) whether Palmetto had misrepresented, or lacked candor concerning, its application ownership structure; and (2) whether Palmetto had violated 47 CFR § 1.65 by failing to report any changes in its ownership structure.

3. Because Rickenbacker claimed to the ALJ that his individual interests could not be protected by Palmetto counsel, he sought leave to intervene as a separate party to this remand proceeding. In the *MO & O* under appeal, the ALJ rejected Rickenbacker's personal intervention request because (*id* ; at para. 3):

> Mr. Rickenbacker has not shown how his interest is different from Palmetto. Any wrongdoing established about Palmetto will reflect on Mr. Rickenbacker as part of that entity, that is unless his testimony shows he is without blame or there is no blame.

The ALJ went on to state (*id.* ; footnote omitted):

> There is, of course, nothing to prevent Rickenbacker from consulting a lawyer about his deposition or testimony, but to allow him to separately intervene would be disruptive. The focus of this proceeding is limited to the designated issues.

APPEAL

4. Rickenbacker's instant Appeal (at p.4) claims:

> It is clear that Palmetto's counsel does not and cannot represent Rickenbacker's interest. Palmetto's interest is diametrically opposed to Rickenbacker's interest. It is Palmetto's interest to prove that Rickenbacker is a liar, which would adversely reflect on Rickenbacker's pursuit of other broadcast interests. Palmetto has filed a Petition to Enlarge Issues claiming that Rickenbacker is a real party-in-interest in Triad and not qualified to be an FCC licensee.

Rickenbacker thus contends that separate party status is necessary to protect "his qualifications in future FCC proceedings."[1]

DISCUSSION

5. The pertinent rule, 47 CFR § 1.223(b), permits intervention petitions by persons not previously named as parties and states in part:

> The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular stage of the proceeding.

Because that judgment is discretionary on the part of the ALJ, and because Rickenbacker has not explained why he did not seek to intervene long ago with his sworn allega-

tions as to Palmetto's reported ownership, we might ordinarily refrain from disturbing the ALJ's negative determination.

6. However, Commission precedent, which the Board must always consider and apply, guides us to accord separate party status to Rickenbacker in the unorthodox situation at hand. It must be recalled that, in the pleadings and replies that led to our *Remand Order*, Palmetto, by and through its current counsel, has repeatedly accused Rickenbacker of making "patently false" representations to the Commission as to the true ownership composition of Palmetto[2]; and it was in principal part based upon Rickenbacker's representations that we remanded this case on the basic qualifying issues we have ordered. We have also indicated that the evidence adduced in the remand hearing might well reflect adversely on Rickenbacker himself, *see Remand Order*, 6 FCC Rcd at 2195 n.7, and it is manifest that Palmetto counsel would have no reason at hearing to protect Rickenbacker's interests or to develop a record that frees Rickenbacker from any personal culpability under the serious issues we have added.

7. Even where it has appeared that the parties' interests were not in such patent and hostile conflict, Commission precedent has permitted separate intervention. Thus, in *Quality Broadcasting Corp.*, 4 RR 2d 865 (1965), the Commission (over Bureau opposition) permitted late and separate intervention by a minority stockholder of an applicant to submit "direct, positive evidence" to "refute the erroneous testimony against him" that might affect "his future ability to earn a livelihood in the broadcasting industry." *See also West Jersey Broadcasting Co.*, 89 FCC 2d 469, 471-72(1980). And *compare AT & T Co.*, 7 RR 2d 515 (1966) (separate intervention denied to individual stockholders where interests *not* plainly adverse); *accord, The Seven Hills Television Co.*, 2 FCC Rcd 6867, 6889 (Rev. Bd. 1987).[3]

8. Although it is true, as both the Board and the ALJ have observed, that the remand issues designated here go primarily to Palmetto, the licensee applicant, it is also a fact that the evidence here might collaterally reflect adversely on either or both of Palmetto's reported principals. Obviously, significant questions exist as to why neither Hallman nor Rickenbacker saw fit to timely advise the Commission as to alleged ruction over its ownership.[4] It is here that a sharp adversity of individual interests seems unavoidable, and Rickenbacker cannot feel confident to have the designated issues defended solely by Palmetto counsel. Under all of the unusual circumstances here, affording separate party status to Rickenbacker appears well within Commission precedent, *see Quality Broadcasting* ; *West Jersey Broadcasting*, and might even sharpen up the evidence under the particular issues we have heretofore designated. *Cf. Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 358 (D.C. Cir. 1949)("It is only common sense to assume that adversaries with substantial interests at stake will overlook no advantage to be found in an opponent's weaknesses.").[5]

9. ACCORDINGLY, IT IS ORDERED, That the Appeal filed August 2, 1991 by Robert Carroll Rickenbacker, Jr. IS GRANTED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Appeal at 2. We note that Rickenbacker is also apparently an applicant for an FM radio station Construction Permit in Bowman, South Carolina. *Remand Order*, 6 FCC Rcd at 2195 n.7.

[2] *See* Palmetto Opposition To Motion To Reopen The Record And To Enlarge The Issues, filed March 20, 1991 at 2.

[3] The Board has consistently held that a person who is a mere witness, with no direct stake in the substantive outcome of a case, will not ordinarily be granted full party status simply to protect reputation. *See WKKQ, Inc.*, 9 FCC 2d 482 (Rev. Bd. 1983); *Hanover Radio, Inc.*, FCC R-66, released September 6, 1983 (Rev. Bd. 1983). But here, as in *Quality Broadcasting*, and *West Jersey Broadcasting*, the outcome of the hearing will fall quite differently on licensee *principals*, and to this date neither Hallman nor Rickenbacker, still the Palmetto partners of official FCC record, has sought to amend its application with respect to that partnership.

[4] More specifically as regards Rickenbacker's request for separate party status, we have no doubt that the ALJ will demand to know why Rickenbacker's serious allegations were not presented to him (or the agency) during the original hearing; and why Rickenbacker did not seek intervention at that time. If it appears that Rickenbacker deliberately withheld information from the Commission while the Palmetto application moved forward (through hearing and beyond), this could very well affect his personal qualifications for licenseeship. *See Character Policy Statement*, 102 FCC 2d 1179, 1210-11 (1986) (subsequent reconsideration omitted); *see generally also KQED, Inc.*, 6 FCC Rcd 625 (1991). The same, of course, is true with respect to Palmetto principal William Hallman. If it turns out that the Commission cannot rely upon either of these two individuals for timely and accurate ownership information, *see* 47 CFR § 73.3615(a)(2), even at the application stage, then -- depending on the evidence -- inferences might surely be drawn as to their potential reliability as Commission licensees.

[5] Rickenbacker and Hallman are now also adversaries in a state court action over the ownership of Palmetto's Yadkinville AM radio station, the very station for which it here seeks a license modification. Appeal at 2-3. The issues there may certainly be of ultimate interest to the Commission. For the moment, however, the issues we have added against Palmetto in this federal licensing proceeding are different, and go instead to the candor and truthfulness of the licensees (*and/or* its officially reported principals).

[6] Because the hearing in this remand proceeding is imminent, we are making pre-publication copies of the Board's ruling available to the parties.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-342

In re Applications of

PONTCHARTRAIN BROADCASTING COMPANY, INC. — File No. BPCT-870330KT

For a Construction Permit for a New Commercial Television Station at Hammond, Louisiana

Appearances

Harry C. Martin, *Andrew S. Kersting*, and *Thomas L. Root* [1] on behalf of Pontchartrain Broadcasting Company, Inc.; *Bradford D. Carey* and *Marjorie R. Esman* on behalf of Louis E. Jenkins d/b/a Florida Parishes Television, Ltd., A Partnership in Commendam[2]; and *Y. Paulette Laden* on behalf of the Mass Media Bureau.[3]

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: August 15, 1991; Released: August 23, 1991

1. Pontchartrain is the only remaining applicant in this proceeding. On November 18, 1988, an initial decision was issued. *Pontchartrain Broadcasting Company, Inc.*, 3 FCC Rcd 6800 (1988). On appeal of the Initial Decision to the Review Board two financial issues were designated with regard to the qualifications of Pontchartrain and the case was remanded for a hearing on those issues. *Pontchartrain Broadcasting Company*, 4 FCC Rcd 5245 (Rev. Bd. 1989). At the Review Board's suggestion and in response to a petition to enlarge by Jenkins, a real party in interest issue was designated. *Memorandum Opinion and Order*, FCC 90M-64, released January 10, 1990. The issues were heard in two separate hearing sessions, one in November 1989 and the other in May 1991. The following issues will be resolved in this supplemental initial decision:

> 1. To determine whether Pontchartrain Broadcasting Company, Inc. is financially qualified to be a Commission licensee.
>
> 2. To determine whether Pontchartrain Broadcasting Company, Inc. falsely certified its application with respect to its financial qualifications and the effect thereof on its qualifications to be a Commission licensee.
>
> 3. To determine whether Ronald Curet is a real party in interest in the application of Pontchartrain Broadcasting Company, Inc. and, if so, whether Pontchartrain should be disqualified.

2. Written testimony on the financial issues was exchanged on November 1, 1989 and hearing sessions were held on the financial issues on November 15 and 16, 1989. Tr. 704-937/949, 950-1069. The record was closed on November 16, 1989. *Order*, FCC 89M-2679, released November 20, 1989. Written testimony on the real party in interest issue could have been exchanged on February 26, 1990, August 3, 1990 and May 1, 1991. A hearing to examine the written testimony was held on May 13, 1991. Tr. 1078-1214. The record was again closed on May 13, 1991. *Order*, FCC 91M-1635, released May 15, 1991. Proposed findings and conclusions on the financial issues were filed on December 13, 1989 by Pontchartrain and Jenkins and they filed replies on December 27, 1989. Proposed findings were filed on the real party in interest issue on June 5, 1991 by the Mass Media Bureau and Pontchartrain; neither party filed a reply.

FINDINGS OF FACT

Issues 1 and 2: Whether Pontchartrain falsely certified its financial qualifications and whether Pontchartrain is financially qualified.

3. Testimony taken during the hearing sessions held March 28 and 29, 1988 indicated that the Pontchartrain stock subscribers were unsure or had differing views about the applicant's financial qualifications. *Pontchartrain Broadcasting Company, Inc.*, 3 FCC Rcd 6800, 6801 (1988). The following findings were made:

> The bank which will lend Pontchartrain the funds needed for the station was not known to the treasurer, Ms. Niehaus, who said hesitantly she thought it was Fourth Security in Slidell. Tr. 187, 188. Mr. Jackson said it was the St. Tammany Parish Bank in Mandeville. Tr. 265. Ms. Kron said it was the St. Tammany Bank. Tr. 342. Ms. Niehaus was vague about how Pontchartrain obtained a loan letter of $5 million. She said Mr. Beaver obtained the letter but she believed it was only with Mr. Curet's help. Tr. 187. Mr. Jackson could not recall when the letter was obtained or when he saw it. Tr. 264. Ms. Kron was definite that she had no involvement in obtaining financing. Tr. 342. Mr. Deiparine was uncertain about how the letter was obtained, what the bank was, and when it was obtained. Tr. 411-18.

4. Pontchartrain treasurer, Keiko Niehaus, explained that Pontchartrain is relying on its stock subscribers to provide $30,000 each. Tr. 174. Ms. Niehaus stated that she had subscribed to 600 shares for which she would have to loan Pontchartrain $24,000 and pay outright $6,000. Tr. 174, 175. At the time of the 1988 hearing, Ms. Niehaus had not purchased any of her shares. Tr. 176. She stated that each "member" had contributed $3,300. Tr. 176. In order to make her payments, Ms. Niehaus took the money from her savings and had a bank loan. Tr. 177. Until all payments were made she believed she would not receive the stock to which she had subscribed. She was asked whether the stockholder loans would be enough to finance the building of the station. She responded, "Well, we try hard, you know." Tr. 177. When questioned further she agreed the loans would not be enough but she did not know exactly what the facility would cost. Tr. 177-78. Ms. Niehaus responded, "Well, I know multi-

million dollars for that." Tr. 178, 179. She said that money to build the station would come from the sale of nonvoting stock. Tr. 179. When she was asked whether she had any current source for the money, she responded that she had "an idea that several people would buy if I tried to sell. . . . " Tr. 179. When she was asked again to be absolutely clear about how the proposal would be financed, she reiterated that the money would come from nonvoting shareholders but that there were none then. Tr. 184. Ms. Niehaus said she had been the treasurer since the application was filed. Tr. 184-85. Mr. Chase, counsel for Pontchartrain, then requested a recess. Ms. Niehaus returned to the witness chair. When she was asked how she would provide the $30,000, she interrupted and said she forgot to mention that the applicant had a $5 million bank loan. Tr. 186. She was nervous she said and had not thought of it. *Id.* The letter was obtained by Mr. Beaver, Ms. Niehaus initially claimed. Tr. 186-87. She then changed that answer and said that Ronald Curet called the bank and arranged for the loan. Tr. 188. That bank, she believed, was Fourth Security. *Id.* She said the bank was located in Slidell, Louisiana. Tr. 187.

5. She said that in order to obtain the $30,000 she had promised to pay, she would retire and use her retirement money. Tr. 189. When she was asked if any of Pontchartrain's principals had asked her where she would get the money, she said it was a "personal" matter, implying that no one had or should have inquired about her ability to finance her stock subscription. *Id.* No one had asked to see her balance sheet or any financial information about her. Tr. 190.

6. Later in the hearing, Ms. Niehaus stated that Harrison Equipment Company made a commitment to lend Pontchartrain money for equipment. Tr. 214. But whether that promise still existed she did not know. Tr. 214. She then represented that the letter from the bank was obtained in 1987, after the application was filed. Tr. 215. She believed it was before June. Tr. 216.

7. Willie Grant Jackson was also asked about financing the proposal. Mr. Jackson was the first vice president of the applicant at the time. Tr. 248. Mr. Jackson also promised to provide $30,000 and, at the time of the hearing, he said he had provided $3,300. Tr. 251. He intended to meet his obligation from savings and a bank loan. Tr. 251. Only general discussions have been had, he said, about where he would obtain his share of the money. Tr. 252. Mr. Jackson said that none of the money he was going to provide would be used to construct or operate the station. Tr. 252. But the money he was going to provide would be needed to pursue the application. *Id.* No one ever asked him to establish that he could provide the money. Tr. 252, 253. Mr. Jackson, as did Ms. Niehaus, believed the company would issue nonvoting stock after a grant was made to raise money. Tr. 260. But when he was asked whether the money would be used to finance construction of the station, he said that it would not. *Id.* He was then asked why Pontchartrain wanted the additional money from stockholders; he stated that he was confused. *Id.* He said that he did not understand why there would be voting and nonvoting stockholders. Tr. 260-61. He said he could not remember why there would be nonvoting stockholders, although he had asked. Tr. 261-62. He asked the questions of Curet & Curet, not Mr. Beaver. Tr. 262. No one had indicated to Mr. Jackson that there were existing potential nonvoting shareholders. Tr. 263. Mr. Jackson said that the station would be financed with a bank loan and that the applicant had a letter from a bank. Mr. Jackson, with some prodding, said he first heard about the bank letter in 1988, sometime during the first three months of that year. Tr. 264. Mr. Jackson represented that he had seen the letter and it came from a bank in Mandeville, Louisiana, the St. Tammany Parish Bank. Tr. 265.

8. Paulina Rovira Kron is a stock subscriber who plans to work at the station; she is not an officer or director because she is not an American citizen. She had nothing to do with obtaining the bank letter. Tr. 342. But she said she had seen the letter. Tr. 343. She did not know whether the letter required that she put up collateral. *Id.* She said she did not have knowledge of the finances and when she was asked who in the group did, she said she did not know. Tr. 344-45. The only person in the group who had any experience with business, she believed, was Ernest N. Deiparine. Tr. 345. She remembered that she did not provide any financial information about herself to the bank. Tr. 348. It was her belief that the letter had been obtained about a year before the April 1988 hearing session. She believed Mr. Curet provided the bank with information. Tr. 349. She claimed that she had provided $3,300 to Pontchartrain, $2000 of which she borrowed from Southeastern Bank. Tr. 349. The loan was arranged by Ronald Curet. Tr. 350. He cosigned for the loan. *Id.* Ms. Kron had no idea whether the other stock subscribers were rich or poor. Tr. 353. She explained that she would not obtain any stock certificates until she had paid $6,000. Tr. 358-59. She, too, said Pontchartrain intended to sell stock to raise money. Tr. 361, 363. Ms. Kron agreed that Pontchartrain intended to obtain funds from a bank but she said that the money from the stockholders would be necessary because more would be needed. Tr. 365. She also indicated that if more money was not needed, the stockholder's money would reduce the need to rely on bank financing. *Id.* Ms. Kron had not, however, decided how she would obtain the money to pay for her shares. Tr. 371. She does not have the money now. *Id.*

9. Ernest Marco Deiparine stated that he would be the business manager and be in charge of the station's budget and act as general manager when the general manager was unavailable. Tr. 388. He did not know how much Pontchartrain estimated that it would cost to build and operate the station. Tr. 398. He represented that Pontchartrain could "for sure" borrow $5 million. *Id.* Mr. Deiparine borrowed $1,000 of the $2300 he paid to Pontchartrain. Tr. 406. He could not remember the name of the bank he borrowed the money from. Tr. 406-07. He believes Mr. Curet cosigned the note for his loan. Tr. 407. He then said Mr. Curet had not but he was sure that Mr. Curet "recommended" he be given the loan. Tr. 407-08. Mr. Deiparine said he did not have any savings or checking account at a bank. Tr. 408. He receives social security and a "little pension." Tr. 408-09. He intends to borrow the remaining part of $30,000 that he has promised to provide to Pontchartrain. Tr. 411. But he has not talked with any bank about lending him the remaining money. *Id.*

10. First Mr. Deiparine said Mr. Chase obtained the bank letter and then he said he did not know. Tr. 412. He then said the president of Pontchartrain, Milo Beaver, went to the bank to obtain the letter. Tr. 413. Mr. Deiparine assumes that Milo Beaver got the letter because he saw it. *Id.* However, Mr. Beaver did not tell Mr. Deiparine that he had obtained the letter. *Id.* In the end,

Mr. Deiparine stated that he did not "know fully" who obtained the bank letter. Tr. 414. He could not remember which year he saw the letter from the bank for the first time. Tr. 414. At first he said it was 1988 and then 1987 or 1988. *Id.* He could not remember which bank had issued the letter. Tr. 415. While he said he had read the letter, he could not remember whether he would have to put up collateral for the loan. Tr. 415, 416. He did not know whether he would be required to guarantee the loan personally. Tr. 417. He did not talk with the bank, or provide any information about himself to the bank, and he did not know that Pontchartrain was going to obtain a bank letter until after it had been obtained. Tr. 417. He also did not know whether anyone spoke with other banks to obtain a letter for Pontchartrain. Tr. 418.

11. Mr. Deiparine said that there were two kinds of Pontchartrain stock, voting and nonvoting, but that there would not be nonvoting stockholders. Tr. 423, 424. Then he said there would be and that nonvoting stock would be sold in order to build the station. Tr. 424. The stock would have to be sold, he said, because the bank loan would not provide enough money. Tr. 424. Mr. Deiparine conceded he did not know how the proposal would be financed. Tr. 425. He could not remember to whom he gave the $2,300 he paid to Pontchartrain. Tr. 428. He claims to have paid it in cash. *Id.* He later said he took it to a bank. Tr. 429. But he concedes he had no deposit slip to put money in a Pontchartrain account. *Id.* While Mr. Deiparine lives in Hammond, which he describes as a small town, he does not know how many people live there. Tr. 430. Mr. Deiparine also corrected his testimony and said he had contributed $3,300, instead of $2,300, as he said in answer to some questions. Tr. 436. He borrowed $1,000 of that amount. *Id.*

12. Despite the foregoing testimony, Pontchartrain represented that, as of November 1, 1989, its voting stockholders had each contributed $2,300 and Mr. Beaver had contributed $7,500. Pontchartrain Exh. 19. Pontchartrain stipulated that on March 25, 1987, when it prepared and signed its application, none of Pontchartrain's stock subscribers had reasonable assurance for a loan or sufficient liquid assets to meet their stock subscription agreements. Pontchartrain Exh. 10.

13. When Jenkins requested that Pontchartrain stockholders appear to explain how the applicant established its financial qualifications, Pontchartrain stated that Mr. Beaver made that determination without the assistance of any other stockholder. Opposition to Witness Notification, filed November 8, 1989 by Pontchartrain Broadcasting Company, Inc., at 4. Mr. Beaver denied that that was the case at the hearing. Tr. 763-64. Nevertheless, he represents that he made the decision about the applicant's finances. He specifically stated that Keiko Niehaus, who is the treasurer, did nothing to obtain financing. Tr. 767-68. He said that the other Pontchartrain principals told him they would be able to obtain the $30,000 they had promised to provide. Tr. 765. They also all met with a banker at Mr. Curet's house. Tr. 767. Mr. Beaver could not remember who the banker was, however. Tr. 767. Mr. Beaver also represented that he was going to be the business manager of the station. *Id.*

14. Pontchartrain's local counsel, Ronald Curet, discussed with the president of Southeast National Bank the issuance by the bank of a letter of reasonable assurance to Pontchartrain.[4] Mr. Curet is a director and member of the loan committee of Southeast National Bank. Tr. 995, 999. Richard Blouin, the president of Southeast National Bank, was concerned that a letter from Southeast National Bank to Pontchartrain would be viewed as an insider transaction because of Mr. Curet's involvement in the applicant and his role at the bank; he suggested approaching the St. Tammany National Bank about a letter. Mr. Blouin called Brian Jakes, the president of St. Tammany National Bank, a "friendly banker." Tr. 995. (Mr. Jakes had helped organize Southeast National Bank, Mr. Curet said. Tr. 995.) Mr. Curet then met with Brian Jakes to explain "what our business was about" in an effort to obtain the letter. Tr. 996. Mr. Curet did not provide Mr. Jakes with any financial information about Pontchartrain's proposal. Tr. 998. Pontchartrain claims that Mr. Jakes had agreed to provide the letter on March 18, 1987 but that Mr. Beaver did not pick up the letter until April 2, 1987. Pontchartrain Exh. 11, at 2-3. Mr. Beaver said that when he went to pick up the letter from the bank it was dated April 2, 1987 but he convinced Mr. Jakes to have the letter retyped and dated March 18, 1987 because that purportedly was the day Mr. Jakes agreed to provide the letter. *Id.* This explanation appears improbable since Mr. Beaver claimed he did not work during that period in order to be available to conduct Pontchartrain business and there was no apparent reason why he would have waited two weeks to obtain the letter. Tr. 859, 870.

15. Mr. Curet agreed that if Southeast's loan committee reviewed Pontchartrain's proposal, it would want to know how much money the stockholders were going to invest. Tr. 1000. He also said that St. Tammany National Bank would require personal guarantees but he conceded that he did not discuss collateral with Mr. Jakes. Tr. 1005. When Mr. Curet was asked why St. Tammany National Bank would make a loan to Pontchartrain in light of the lack of information given to the bank, he said he could not provide a reason. Tr. 1003. He said Pontchartrain only solves problems when faced with them and he said he did not know how the applicant would structure itself at the time it applied for a loan. Tr. 1004.

16. Pontchartrain's counsel, Seymour Chase, provided the applicant with cost estimates and a staffing proposal. Tr. 771-72. Milo Beaver could not remember whether he received them before he signed the application. Tr. 774. Nor could he remember whether he had any say about the estimates when they were prepared or whether he made any changes after they were prepared. Tr. 772. He also did not know whether there was an equipment proposal when Brian Jakes considered Pontchartrain's request for a letter. Mr. Beaver was unable to testify about the financial estimates without reference to materials prepared by Pontchartrain's counsel. Tr. 747, 749.

17. Pontchartrain intended to pay the costs of this proceeding as they were incurred. Tr. 790-91. At the time of the hearing Pontchartrain owed Seymour Chase $68,000. Tr. 780. Ronald Curet arranged a $5,000 loan to Pontchartrain when its consulting engineer insisted on being paid before he undertook additional work. Tr. 1019. The loan is outstanding. Tr. 1020. Mr. Curet cosigned the loan and obtained the loan from Southeast National Bank where he is on the loan committee and a director. Only interest has been paid on the loan. Tr. 1020-21. Mr. Curet paid $150 interest when the loan had to be rewritten. Tr. 1021. Mr. Beaver did not know that Mr. Curet had made the payment. Tr. 822. The shareholders were supposed to repay the loan. Tr. 829. Although Pontchartrain's princi-

pals maintained that they would provide $30,000 pursuant to stock subscription agreements, Mr. Beaver denied that the stock subscription money was planned or needed. Tr. 833-34. He also said in contradiction of that statement that Pontchartrain would meet any equity requirements with the stockholders' $30,000 commitments. Tr. 795-96. Pontchartrain owes its consulting engineer about $1800, a bill that was 1 1/2 years old at the time of the hearing. Tr. 858, 861. Pontchartrain concedes it does not have the money to pay it. Tr. 861. The shareholders have not and probably will not contribute the money owed to Mr. Chase. Tr. 864-66. At the time of the hearing, Pontchartrain did not have a source for the $68,000 owed to Mr. Chase. Tr. 866. Pontchartrain also owed Mr. Curet, at the time of the hearing, between $20,000 and $23,000. Tr. 991. Mr. Curet believed that Pontchartrain could not pay the bills unless it received a grant of its application. Tr. 992. Mr. Beaver, for example, had not worked for a salary for the last several years. Tr. 858-60. He earned $500 during the year preceding the hearing. Tr. 867. At one point Mr. Beaver indicated the stockholders would pay the bills and at another he said the money would have to come from the sale of stock. Tr. 866, 781. Pontchartrain did not ask the bank to provide money for legal fees. Tr. 791.

18. The letter from the St. Tammany National Bank would not "hold up," Pontchartrain's counsel told Mr. Curet after his October 25, 1989 deposition. Tr. 1007-09. Mr. Curet contacted Jack Blossman about getting another bank letter for Pontchartrain. Tr. 1007, 1008. Mr. Blossman is the president of Parish National Bank of St. Tammany. Tr. 1050-51. Mr. Curet did not provide Mr. Blossman with information about Pontchartrain's proposal or its shareholders. Tr. 1009, 1011, 1056. He did not explain to Blossman how the $5 million would be spent. Tr. 1010. They also did not discuss collateral, personal guarantees or pledges of stock. Tr. 1010. Mr. Blossman was not even provided with a list of Pontchartrain's stockholders. Tr. 1011. The only Pontchartrain principal ever identified to Mr. Blossman was Milo Beaver. Tr. 1056. And that was not done until they met at the hearing when Mr. Blossman testified. Tr. 1056.

19. Mr. Blossman wrote his letter for Pontchartrain the day Mr. Curet went to see him. Tr. 1052. Mr. Curet knows that Parish National Bank could not lend $5 million dollars without the assistance of other banks but he did not ask Mr. Blossman about how that would be done. Tr. 1011-13. The letter is the same as that which Pontchartrain received from the St. Tammany National Bank except that Parish National Bank does not guarantee that it can arrange to syndicate the loan. Tr. 1054-55. When they spoke, Mr. Blossman congratulated Mr. Curet on getting the license but Mr. Curet said there was a problem because St. Tammany National Bank had been closed by regulators and the applicant needed financing. Tr. 1054. Mr. Blossman said he assumed that the personal guarantees of Pontchartrain's principals would be required. Tr. 1055. Milo Beaver said, however, that he had not agreed to guarantee the loan. Tr. 793.

20. Mr. Blossman does not consider the letter to Pontchartrain from his bank to provide a commitment. Tr. 1056. There has been no determination of how much equity Pontchartrain must provide to receive a $5 million loan. Tr. 1057. Ordinarily, when Parish National Bank provides a letter making an advance commitment, the borrower makes an actual loan application and the bank reviews the value of the property to be financed. Tr. 1058-59. This letter was outside the ordinary course of business conducted by the bank. Tr. 1057-58. The loan process for this large a loan would require a lengthy review and approval by the other banks that will participate in the loan. Tr. 1061. None of the factors that will influence the bank in making the loan were reviewed before Mr. Blossman wrote his letter to Pontchartrain. Tr. 1062. Mr. Blossman readily admitted that he did not know how many shareholders Pontchartrain has or its current financial position. Tr. 1067. The only document in the transaction between Pontchartrain and Parish National Bank is the letter from Mr. Blossman. Tr. 1068.

21. Mr. Beaver stated in his written testimony that he had met with Mr. Blossman but he retracted those statements when he was examined at the hearing. Tr. 715-16. He conceded he had never spoken or corresponded with Blossman or sent him documents. Tr. 792. Other parts of Mr. Beaver's testimony were inaccurate, despite his review of it, and had to be changed. Tr. 707-17. Actually, Mr. Beaver conceded, all the arrangements with Parish National Bank were made by Mr. Curet. Tr. 792. Mr. Curet did not tell Mr. Beaver whether he would have to put up any of the money for the proposal in order to obtain the loan. Tr. 793-94.

Issue 3: Whether Ronald Curet is a real party in interest in the application of Pontchartrain Broadcasting Company

22. Ronald Curet initiated the Pontchartrain application. He was told about the availability of the channel by Washington, D. C. communications lawyer Seymour Chase. Pontchartrain Exh. 21, at 1. When Chase called Mr. Curet about the opportunity, he explained about the comparative process and the importance of female and minority ownership in selecting licensees. Pontchartrain Exh. 21, at 2. Ronald Curet discussed Chase's proposition with his brother Douglas, who was then his law partner. Pontchartrain Exh. 21, at 2; Tr. 1090. They decided to form a group to apply for the channel. Mr. Curet said he selected persons who could undertake the responsibility of operating the station. Tr. 1090. He explained that his motivation in organizing the group was to become their counsel. Currently, Curet has a general practice with 30 to 40 percent of his business in personal injury cases. Pontchartrain Exh. 21.

23. Milo Beaver was Pontchartrain's first president and is now its vice president. He was approached by Douglas Curet about joining a group to apply for the Hammond facility. Tr. 38; Pontchartrain Exh. 20. He had known Douglas Curet for about four years when Mr. Curet called him; they had met when Beaver asked Curet to organize a corporation for him. Tr. 38. After that, they had had no regular contact. Tr. 39-40. Mr. Beaver said Curet identified Ernest Deiparine and Willie Jackson as people he had in mind to join the group; Mr. Beaver did not know them. Tr. 40. Mr. Curet told Mr. Beaver that the candidates were selected because they were eligible for minority preferences in the licensing process. Tr. 41.

24. Willie Grant Jackson was called by Ronald Curet. Mr. Jackson explained, "He told me to come by his office, he wanted to talk to me." Tr. 245. Mr. Jackson knew Mr. Curet because he had represented his daughter when she was in an automobile accident. Tr. 246. Mr. Curet also represented Mr. Jackson in a family matter involving his stepfather. *Id.* Mr. Jackson was told by Ronald Curet that he was selected because he is a member of a minority

group. Tr. 247. Paulina Rovira Kron was called by Ronald Curet. Tr. 310. She knew him because her son and Curet's son were school classmates and Kron had gone to the Curet home a few times. *Id.* Ms. Kron said she believed Curet was "giving [her] a break" by selecting her to join the group. Tr. 313.

25. Ernest M. Deiparine was called by Ronald Curet. Tr. 389-90. Deiparine and Curet's spouses are friends. *Id.* Mr. Deiparine also believes he was called because he is a member of a minority group. Tr. 392. Mr. Deiparine said he believed that Mr. Curet was putting a group together because he wanted a television station in Hammond. Tr. 391. Mr. Curet told him that Hammond was a good place for a television station. Tr. 392. Mr. Deiparine said he was surprised that he was called. *Id.* When Mr. Deiparine was asked whether he inquired of Mr. Curet how he knew that Hammond was a good place for a television business, he said, "No, I didn't question him about that. I trust him that he know something." *Id.* Mr. Deiparine did not know the other people who were to be part of the group. Tr. 393. He did not know how much money would be needed for the station (Tr. 398), although he is proposed as the station's business manager. Mr. Deiparine, who retired as an operator of and cook at a New Orleans restaurant in 1982, has not previously made any investments. Tr. 405-06. He lives on his monthly social security payment and a small pension from the Merchant Marine. Tr. 408-09. He has no bank accounts. *Id.*

26. The only stockholder who was not selected by the Curets was Keiko Iwasaki Niehaus. She was asked to join the group by Milo Beaver. Mr. Beaver worked at the Seventh Ward General Hospital in Hammond where Ms. Niehaus works. Tr. 143. But he quit that job, according to Ms. Niehaus, three years before the hearing and she did not know what he did after that. Tr. 143, 145. When Mr. Beaver called her about this application, she had neither seen nor talked to him for about three years. Tr. 145, 151.

27. The five principals of Pontchartrain, Mr. Beaver represented in 1988, attended monthly board meetings. Tr. 43-44. He initially maintained that minutes were kept of all board meetings, but he immediately backed away from that claim and said that minutes had not been kept for all meetings. Tr. 44. He also represented that minutes were prepared within a few days of each meeting but, in earlier interrogatory answers, Mr. Beaver said there were minutes for 12 meetings and that minutes for other meetings had not been prepared. Tr. 45, 47. He could not remember which meetings had minutes. Tr. 49. There is no corporate minute book; but the minutes that do exist were kept in a file at Curet's law firm. *Id.* Mr. Beaver, in his testimony, implied that Pontchartrain's affairs were conducted in an ordinary manner; but when his representations were examined, he backed away from what he first said. For example, meetings, which he claimed were held monthly, were not all business meetings. He explained that some of the gatherings were actually social occasions. Tr. 43-44.

28. In 1991, Mr. Beaver did not know how many board meetings were held and he did not know how many times Mr. Curet attended meetings. Tr. 1157. Mr. Beaver could not remember when Pontchartrain stopped having board meetings at Curet's office, but he stated there was a time when meetings were no longer held there. Tr. 1169. Although he could not remember when, or how many, board meetings were held, he remembered specifically (after just previously saying that he did not know) that Mr. Curet attended two board meetings. Tr. 1169. One of the meetings Mr. Curet attended, which Beaver believed was not actually a board meeting, was a meeting with Richard Blouin of Southeast National Bank and Pontchartrain's communications counsel Seymour Chase at Curet's house. Tr. 1169. Mr. Beaver said there was one other occasion when Curet brought documents, "papers, or something like that" to a meeting. Tr. 1169. Mr. Beaver contradicted his 1988 testimony and stated during the 1991 hearing that Pontchartrain's minutes were never kept at Mr. Curet's office. Tr. 1186-87. He contradicted his 1991 direct testimony on redirect examination when he said that the directors of Pontchartrain had twice a week meetings and that monthly meetings were held only initially. Tr. 1188.

29. Mr. Beaver did not assess the qualifications of the other principals, or, if he did, he could not remember doing so. Tr. 64. The only person he was even slightly acquainted with was Niehaus. Tr. 64. Mr. Beaver could not remember when the principals of Pontchartrain discovered that Ms. Kron was not an American citizen, although that discovery changed both the officers and directors of the applicant. Tr. 65.

30. Mr. Beaver did not know whether there were corporate by-laws but he represented that everything was as it should be with regard to the corporation's legal organization and affairs. Tr. 50. Despite Ms. Kron having to give up her position as an officer, Mr. Beaver could not remember and did not know where to look in the corporate documents to find out how a director or officer could be removed or replaced. Tr. 75. During the hearing recess, Mr. Beaver appears to have been coached about what answers to give. At first he did not know if there were corporate by-laws but after lunch he knew there were. Tr. 79. He then said that all the directors decided what the by-laws would be but, despite that claim and his role as president, he could not remember what any of the by-laws provided. Tr. 81-82. He did not know when the annual meetings of Pontchartrain should be or when they were held. Tr. 83-85. He did say the Curets decided the by-laws were necessary and that they were present when they were signed. Tr. 93, 94. Mr. Beaver could not remember whether there were minutes for the meeting enacting by-laws. Tr. 94. Mr. Beaver explained that Ronald Curet told Pontchartrain's principals what to do to complete the application and he also arranged to hire Mr. Chase. Tr. 99-100.

31. Ms. Niehaus stated that it was Mr. Curet who told Ms. Kron that she was ineligible to be an officer of Pontchartrain. Tr. 148. Although there are only five Pontchartrain principals, Ms. Niehaus could not remember or did not know what Mr. Jackson would do at the station. Tr. 165. (He is the proposed director of news and public affairs. Pontchartrain Exh. 3, at 1.) None of Pontchartrain's stockholders were able to pronounce Mr. Deiparine's last name correctly in 1988. Tr. 382. Mr. Deiparine represents that he will prepare the station's budget but, when a budget was prepared for the first three months of operation, he had no role. Tr. 389.

32. In 1991, Mr. Beaver was no longer president of Pontchartrain, he was first vice president of Pontchartrain. Tr. 1154. Mr. Beaver believes he was no longer president after July 1990. Tr. 1155. Willie Grant Jackson is now president. Tr. 1155. Mr. Beaver said that apparently, during the time when he was president, he did not take full-time work in order to be near the

telephone in case Mr. Curet called him to work on Pontchartrain. Tr. 1167. Mr. Beaver claims that Mr. Curet cosigned loans for the Pontchartrain shareholders because there was not enough time for the bank to process all the necessary paperwork. Tr. 1170. The Bureau suggested to Mr. Beaver that the Pontchartrain stockholders never intended that Mr. Curet would pay off the loans and Mr. Beaver agreed. Tr. 1170.

33. After the real party in interest issue was designated, Pontchartrain's stockholders allegedly dismissed Mr. Curet as their counsel. Bureau counsel asked Mr. Beaver under what circumstances he was dismissed and Mr. Beaver said he was out of town at the time but he suggested it had to do with the distribution of funds Pontchartrain was going to receive from the sale of stock. Tr. 1172-73. Mr. Beaver said that without reviewing the contract he could not remember the exact reason, although he believes Pontchartrain's stockholders were unhappy that their attorneys' bills were going to be paid before they got money from "nonvoting" stockholders who were becoming owners of 75 percent of Pontchartrain's equity. Tr. 1173. The Bureau suggested to Mr. Beaver that Mr. Curet put together the settlement to obtain payment of his services and Mr. Beaver answered, "Himself and Seymour Chase." Tr. 1173. When Mr. Beaver was asked if it was not normal for people who are owed money by a corporation to receive payment before the stockholders receive any benefit, he said he did not "know that as a fact." *Id.* Mr. Beaver explained that Pontchartrain never did pay Mr. Curet because his bill was being disputed. Tr. 1177-79. But he could not identify a single item on the bill that was disputed. Tr. 1178-79. Mr. Beaver said that Mr. Curet's hourly rate to Pontchartrain was in writing. Tr. 1179.

34. Mr. Beaver said that Pontchartrain's checkbook is now kept by Mr. Deiparine and checks are signed by Jackson and Niehaus. But Mr. Beaver has no idea how many checks were written when he wrote them and does not know how many have been written since. Tr. 1181-82.

35. Mr. Beaver, on redirect examination, represented that Mr. Curet became liable for Pontchartrain's bank loans because the money was needed immediately. Tr. 1195. Mr. Beaver claimed it was because Pontchartrain's principals could not go to the bank on short notice. *Id.* (The money, he said, was needed to pay the engineer's bill. *Id.*) Mr. Beaver was unable to explain why those principals who do not work could not have gone to the bank. Tr. 1195-96. Counsel for Pontchartrain then suggested to Mr. Beaver that the fact that some principals could have gone to the bank would have been inadequate since the bank required the signatures of all principals. Tr. 1196. Mr. Beaver, following counsel's leading question, agreed with him. *Id.* But when questioned further, Mr. Beaver admitted he did not know whether the bank required all signatures and he did not know whether one principal's signature would have been sufficient. Tr. 1196-97. When it was pointed out to him that the bank actually did take only one signature, that of Mr. Curet, his response was as follows, "They just said, as a matter of formality, they always take somebody else's . . . . " Tr. 1197. Because that answer made little sense, he was asked again and he indicated that Mr. Curet is "some type of bank officer." *Id.* When Mr. Beaver did not know what "type" of officer Mr. Curet was, his counsel suggested to him that Mr. Curet was a director of the bank and Mr. Beaver agreed. Tr. 1198.

36. Mr. Beaver also indicated that Mr. Deiparine had not gone to the bank to sign for the loan because he traveled a lot. Tr. 1196. When he was asked a few minutes later if Deiparine would still be the station's business manager because he traveled, he said he did not know that Mr. Deiparine often traveled. Tr. 1208. Mr. Curet was also asked by counsel to represent that Mr. Deiparine was a man of means. Tr. 1150-51. Mr. Curet responded that he believed Mr. Deiparine had sold his restaurant or bakery business "at a comfortable figure." Tr. 1151. (Mr. Deiparine said that he no longer had any funds left from the sale of the restaurant. Tr. 409.) Mr. Curet conceded that he had not known Mr. Deiparine very long, although he had known Mr. Deiparine's spouse 25 or 30 years. *Id.* Counsel also asked Mr. Beaver whether he knew anything about Mr. Deiparine's wealth. Tr. 1198. Mr. Beaver said he did not know "exactly" but that he lived in a "very, very nice home." *Id.* Mr. Deiparine, on the other hand, said that the home he lived in was not owned by him. Tr. 411. And when Mr. Deiparine was asked how he came up with the money he contributed to Pontchartrain, he said he saved it out of his social security pension. Tr. 437.

37. In May 1991, Mr. Beaver described his employment as a "spiritual healer." Tr. 1165. He said that he gives workshops in private homes, craft fairs, hotels, and schools. *Id.* Mr. Beaver said he had never been unemployed because he earned money. Tr. 1166. He implied that that was the case at all times. *Id.* But in March 1988, when Mr. Beaver was asked where he worked, he said, "Well, right now, I'm unemployed." Tr. 136. He then said he did "free work" 20 hours per week. *Id.* He said he had no employment where he was paid. *Id.* In 1988, Mr. Beaver said his field of endeavor was "respiratory therapy" when he worked. Tr. 137. Mr. Beaver described that form of therapy as "anything to do with the heart or lungs and the care of it through technical work under the direction of a physician." *Id.* It was the kind of work he had done for 17 years, he said. *Id.* Mr. Beaver described himself as "burned out" and that was why he would like to operate a television station. Tr. 138.

CONCLUSIONS

Issues 1 and 2: Pontchartrain has not established that it is financially qualified and it has not established that it had a financial plan when it certified.

38. The Review Board has promulgated the following standards for determining reasonable assurance of a committed source of funds from a bank: 1. "[T]he bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data . . . . " *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd* , 6 FCC Rcd 1988 (1991). 2. Or, "the prospective borrower has provided the bank with such data and the bank is sufficiently satisfied with this information . . . . " *Id.* There should be an understanding by the bank of collateral guarantees available and the borrower should be familiar with and accept the terms and conditions of the proposed loan. *Id.* There must be preliminary review of the qualifications of the individuals who are borrowing, which should include a demonstration of collateral and a specific identification of the "tentative terms" of the loan. The terms of the loan

should be satisfactory to both the borrower and lender. *Id.*, *See Edwin A. Berstein*, 6 FCC Rcd 2875 (Rev. Bd. 1991).

39. Pontchartrain has not established that the two bank letters it relies on were obtained through any deliberate process of assessment by the bank or Pontchartrain. Pontchartrain has five principals and when they were questioned during the hearing they did not know what the applicant's financial plan was, except in the most general way. Moreover, their testimony conflicts with the representation made in written exhibits prepared by counsel and their testimony is inconsistent with each other. In all respects, Pontchartrain's principals' statements exhibited uncertainty about Pontchartrain's financial plan. At the first hearing sessions in this case, four of Pontchartrain's five principals were asked about the applicant's financial plan. These four, Keiko Niehaus, Pontchartrain's treasurer, Willie Grant Jackson, its current president, Paulina Rovira Kron, and Ernest Deiparine, the proposed business manager, testified only once; their testimony demonstrated that they had no understanding of the plan.

40. Ms. Niehaus represented at the start of her testimony that the applicant would rely on loans from the five stockholders to build and operate the station. She said each of them would contribute $6,000 and lend $24,000. But, although she is the treasurer, she did not know what the facility would cost. She said it was her belief that money to build the station would also be raised from the sale of nonvoting stock. Counsel then requested a recess and Ms. Niehaus said after the recess that the applicant had a letter from a bank offering assurance of a loan of $5 million. First she said that the letter was obtained by Mr. Beaver and then she said it was obtained by Ronald Curet. While such a letter existed, the bank she named as issuer was inaccurate. Although Ms. Niehaus had promised to provide $30,000, no one ever asked her about her ability to provide the money. It was a "personal" matter she said. Ms. Niehaus said the letter obtained from the bank was gotten after the application was filed.

41. Mr. Jackson also said he did not have a source for the money he promised to lend. There had been only general discussions. It was his view, unlike Ms. Niehaus, that none of the $30,000 he was going to provide would be used to construct and operate the station. No one ever asked him to establish that he could provide the money. Mr. Jackson also said that Pontchartrain would raise money by selling nonvoting stock. He did not agree that that money would be used for construction and operation. Mr. Jackson said the applicant would rely on a bank loan for financing construction and operation of the station. He conceded that he had not heard about the bank loan until 1988, a year after the application was filed. Mr. Jackson was not sure what the purpose was of having nonvoting shareholders, although he had asked Curet about it.

42. Paulina Kron knew there was a letter from a bank. She did not know whether it provided for collateral and she did not know who among the five principals knew about the applicant's finances. When she had to contribute money, she borrowed most of it and Ronald Curet cosigned the note. Ms. Kron said that the loan from the bank would not be enough, Pontchartrain would have to rely on money from its shareholders. She had not decided how she would finance her share. Ernest Deiparine, who is to be the station's business manager, did not know what Pontchartrain estimated it would cost to build and operate the station. He believed that Pontchartrain could "for sure" borrow $5 million but he did not know the name of the bank. He intends to borrow the money he has to pay to the applicant but he has not made any arrangements to do so. Mr. Deiparine thought Mr. Chase obtained the bank letter and then, on second thought, he said Milo Beaver obtained the letter. He had no information that supported that belief. When that was pointed out he said he did not "know fully" who got the letter. He did not know the name of the bank either. He did not know whether collateral would be necessary. Mr. Deiparine never provided financial information about himself. Mr. Deiparine said that the money from the sale of nonvoting stock would be used to build the station. In the end, when questioned further, he said he did not know how the proposal would be financed. He could not even remember to whom he paid the money he had contributed.

43. While Deiparine, Kron, Niehaus and Jackson all said they had contributed $3,300 at the hearing in 1988, in 1989, Pontchartrain represented they had contributed only $2,300 per person. Pontchartrain conceded that none of the five shareholders could loan the money they had promised when the application was filed.

44. Pontchartrain represented at the 1989 hearing sessions that Mr. Beaver determined the applicant's financial qualifications without help from the other shareholders. Mr. Beaver denied that claim at the hearing. Mr. Beaver said the other shareholders told him they could provide the promised $30,000. While Mr. Beaver claims that he obtained the bank letter, the record reflects that Mr. Curet arranged for both letters. The first letter from St. Tammany National Bank was obtained after Richard Blouin, the president of Southeast National Bank, called Brian Jakes at the St. Tammany National Bank. Mr. Blouin did not want to provide the letter because he was afraid that if Southeast National Bank issued the letter to Pontchartrain it might be viewed as an insider transaction since Ronald Curet is a director and member of the loan committee of the bank. Mr. Jakes helped organize Southeast National and Mr. Blouin knew he would be receptive to writing the letter. Mr. Blouin was not provided with any financial information about the applicant. There was no discussion of collateral. Mr. Curet could not provide any reason why St. Tammany National Bank issued the letter. He conceded that Pontchartrain has not decided how it would even structure itself when it applies for the loan.

45. Less than two weeks before the 1989 hearing sessions on this issue, counsel decided that the St. Tammany National Bank letter would not "hold up." (Actually the bank had gone out of business when it was closed by regulators.) Mr. Curet contacted Jack Blossman at the Parish National Bank of St. Tammany. Mr. Blossman provided a letter offering assurance of $5 million immediately, on the day Mr. Curet went to see him. Mr. Curet did not provide Mr. Blossman with any information about Pontchartrain's shareholders or principals. Mr. Blossman conceded at the hearing that he did not know who the shareholders were and he had not been provided with their names. He had only met Mr. Beaver on the day he testified. Curet and Blossman did not discuss collateral, personal guarantees or pledges of stock. Mr. Curet knew that Parish National Bank of St. Tammany could not lend $5 million but he did not ask how the loan would be made. And Mr. Blossman refused to guarantee that Parish National Bank could syndicate the loan. Mr. Blossman

said that Pontchartrain's personal guarantees would have to be provided. Mr. Beaver said he had not agreed to provide any guarantee.

46. There is no question that Pontchartrain was never at any time financially qualified and that it is not qualified. It has not demonstrated that any principal of Pontchartrain did anything to determine the applicant's financial qualifications before it certified them. Pontchartrain claims that Mr. Beaver made the determination and he claims the other shareholders assisted him in making the determination. The record does not support those representations. Mr. Beaver said that Seymour Chase, then the applicant's counsel, provided him with cost estimates and a staffing proposal. But Mr. Beaver could not remember whether he received them before he certified. He also could not remember whether he had any say in their preparation or whether he made any changes. Mr. Beaver could not even say whether there was an equipment proposal before the letter was sought from Brian Jakes of St. Tammany National Bank. Without reading from testimony prepared by counsel, Mr. Beaver was unable to testify about Pontchartrain's estimates. Pontchartrain attempted to assert that Mr. Beaver helped obtain the letter from at least the St. Tammany National Bank. But the record reflects that Mr. Beaver did no more than pick up the letter on April 2, 1987, after he had certified on March 30, 1987. Mr. Beaver concedes that he and Mr. Jakes only discussed how interest rates fluctuate. Pontchartrain has not established that Mr. Curet arranged for the letter before Mr. Beaver certified. The testimony indicates that Mr. Curet asked Southeast National Bank and Richard Blouin of Southeast National Bank asked Brian Jakes at St. Tammany National Bank to issue the letter because Mr. Blouin was concerned that a letter to Pontchartrain from his bank would be viewed as an insider loan to Mr. Curet.

47. There is no evidence that Mr. Beaver or any other principal of Pontchartrain, including Mr. Curet, made the necessary analysis to determine whether the applicant was financially qualified. The principals of Pontchartrain did not determine whether they could meet their own obligations to the applicant, whatever the purpose: whether it was to buy stock, pay prosecution expenses or build and operate the station. Each principal had his or her own view of why they were required to contribute money; it is evident they had no idea what the money was to be used for. It cannot be concluded that Pontchartrain could have certified in good faith. As Mr. Curet pointed out, the principals had not even decided how they would be organized and they were incapable of planning ahead. Pontchartrain has not demonstrated in response to these financial issues designated by the Review Board that it would be an entity the Commission could rely on. Pontchartrain is financially unqualified and it failed to act in good faith when it certified that it was.

48. The record on these issues was closed on November 16, 1989. *Order*, FCC 89M-2679, released November 20, 1989. On May 9, 1991, almost 1 1/2 years after the close of the record, Pontchartrain petitioned for leave to amend to put forward a new technical proposal and a new financial proposal. Pontchartrain, after a full hearing, was unable to demonstrate that it properly certified or that it is financially qualified. Both of the issues raised matters totally within its control. Pontchartrain is unqualified because it failed to demonstrate that it is qualified and reliable. A new financial plan would not negate the fact that Pontchartrain knowingly claimed for five years before the Commission that it was qualified when it was not. This is Pontchartrain's third financial plan; it comes too late in the proceeding and would violate the long held principle that "in the absence of a demonstration by the applicant that it had reasonable assurance of financing at the time of certification, subsequent petitions to amend financial proposals have been disallowed." *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991) (footnote omitted). Pontchartrain's claim of good cause fails to consider the character issue involving its financial certification. It argues that since it is the only applicant it should receive another opportunity to change its finances because no other applicant would be prejudiced. The extremely late filing only demonstrates that Pontchartrain is unreliable. Pontchartrain suggests that it is the Commission's fault that it requires a new financial showing. The argument is irresponsible at best. Pontchartrain's financial problems were of its own making. Not a single principal of Pontchartrain did anything to establish a financial plan for the applicant. With the past behavior of Pontchartrain's principals as a guide, the currently proffered plan raises questions which probably would require a further hearing. If the service on this channel is a possibility in the near future, there should not be any problem finding qualified applicants. Pontchartrain has not established good cause for amending at this late date. Pontchartrain's technical amendment has not been considered because it concedes it does not comply with the Commission's rules. The petition for leave to amend will be denied.

Issue 3: Ronald Curet is a real party in interest in the Pontchartrain proposal.

49. Ronald Curet is not a declared principal in Pontchartrain's application but he has acted in "such a manner as to demonstrate plainly a likelihood of unduly strong influence, or even control over broadcast station operations." *Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163, 4163-64 (Rev. Bd. 1991). Mr. Curet and Pontchartrain maintain that he acted only as Pontchartrain's local counsel and exerted no more influence than might be expected. The record reflects that his exercise of authority over the applicant was pervasive and that no putative owner had any control over the applicant's affairs or understanding of the decisions that were made on behalf of the applicant. In addition, the testimony of Milo Beaver, Pontchartrain's former president and current vice president, was unreliable. Mr. Curet's testimony on some matters is also unreliable.

50. Ronald Curet initiated Pontchartrain's application. He and his brother, Douglas Curet, carefully selected four of the five principals of Pontchartrain. All five were selected to match the minority and female preferences awarded under the qualitative integration criteria. They were told by the Curets when they were approached that that was the reason for their selection. Douglas Curet called Beaver and Ronald Curet called Kron, Jackson and Deiparine. The Curets knew about Jackson and Beaver through legal work they had done for them. Kron's son was a classmate of Ronald Curet's son and Deiparine's spouse was a longtime acquaintance of Ronald Curet. None of the persons selected by the Curets knew each other; their only tie was to the Curets. Mr. Beaver recruited Ms. Niehaus but they were not close friends and did not know each other very well. Three years before

Beaver called Ms. Niehaus, they had worked together at a local hospital. Ms. Niehaus said that she had neither seen nor talked with Beaver during the three years after he had left the hospital. She did not even know how Beaver occupied his time after he left the hospital.

51. The principals of Pontchartrain were each to contribute $30,000 to the applicant. Part of the money was to be a contribution and part was to be a loan. Pontchartrain stipulated in November 1989 that none of Pontchartrain's principals had the necessary resources to lend or contribute the money required. Mr. Curet, who is ostensibly only the applicant's lawyer, has not been paid. Pontchartrain estimates that the construction and operation of the station will cost somewhere around $5 million. (The testimony varies on whether more or less than that amount will be needed.) None of the principals of Pontchartrain have any experience in operating a large or small business except Deiparine. Mr. Beaver at the time of the 1988 hearing session said he was unemployed, although he claimed he was a "respiratory therapist" in years past. In 1991, he represented that he was a "faith healer." Ms. Kron said when she testified in 1988 that she was a self-employed bridal consultant. Tr. 309. Ms. Niehaus works at a local hospital, where she is a licensed practical nurse. Tr. 152. Mr. Jackson is a high school teacher who said he was eligible to retire. Mr. Deiparine operated a restaurant in New Orleans with his brother-in-law where he did the cooking. He retired in 1982 and he is now over 80 years old. The record reflects they all looked to Curet to direct the group and thought of him as its leader. Ms. Kron believed that Curet was giving her a break by selecting her. Mr. Deiparine said he was surprised that he would be considered but he did not question Mr. Curet about the opportunity. When he was asked why he did not, Mr. Deiparine said, "I trust that he know something." Mr. Jackson said that Mr. Curet did not tell him about the opportunity over the telephone or come to see him; instead, Mr. Jackson said, "He told me to come by his office, he wanted to talk to me." Mr. Beaver explained that he did not take a job or work because Mr. Curet told him to make himself available in case he needed him.

52. There is no evidence that the group acted independently of Mr. Curet in any respect. Mr. Curet hired Seymour Chase, the lawyer who told him about the proceeding. Curet took all the steps to organize the applicant and to arrange financing. He told the principals how to complete the application. When money was needed by the applicant and its principals to pay fees or bills, he signed or cosigned notes at the bank where he was a director and member of the loan committee, Southeast National Bank. When each of the principals was examined on their understanding of the applicant's financial arrangement, none of them was able to explain what the arrangements were. They gave inconsistent and inaccurate accounts of what had and would be done to finance the project. Mr. Curet stated that the group had not decided how it would organize when the time came to borrow money and operate the station. In fact, Mr. Curet's authority over Pontchartrain was so well recognized, that Richard Blouin, the president of Southeast National Bank, would not provide a letter of reasonable assurance to Pontchartrain because he was afraid that regulators would see the letter as an insider transaction since Mr. Curet is a director and member of the loan committee of the bank.

53. Mr. Beaver explained that the principals met once a month and then he said they met twice weekly. But it is unclear what, if anything, was decided at the meetings. He provided one version before this issue was designated and another afterward. In 1988, he said there were monthly meetings which were held at Curet's office. He said there were minutes for the meetings. When he was questioned he said that some meetings did not have minutes and some "meetings" were social events. He did not know whether the applicant had by-laws until after a hearing recess was called. When the hearing resumed, he clearly had been coached and he said there were by-laws. He represented that the principals decided what they would be. But he had no knowledge about them, even those that presumably would have applied to actions taken by the directors. Mr. Beaver later admitted that the by-laws were written and prepared by Mr. Curet. In 1988, he said the corporate minutes were kept at Mr. Curet's office. In 1990, when Pontchartrain wanted the Commission to believe Mr. Curet did not exercise control over the applicant, Mr. Beaver said the minutes had never been kept at Mr. Curet's office.

54. Mr. Beaver initially stated that he did not know how many directors' meetings Mr. Curet attended. He then said that there were two: One was held at Mr. Curet's house with a banker and Seymour Chase and the other was a meeting where Curet dropped off some documents. Mr. Beaver, for reasons which are unclear, then said that neither one of these instances were meetings. In another part of his testimony, he indicated that the Curets were present at the meeting when the by-laws were enacted and signed. Mr. Beaver never explained why that meeting did not count. Nor could he remember whether there were minutes to commemorate the enactment of the by-laws.

55. It seems improbable that the directors of Pontchartrain met frequently to decide substantive matters involving the applicant without Mr. Curet. As already pointed out, none of the directors knew what the financial plan was. None of them could pronounce Mr. Deiparine's name as he did when he testified. Ms. Niehaus did not know what Mr. Jackson would do at the station. The evidence indicates that none of the principals examined the background of the other principals to see whether they could carry out the proposal. No inquiry was made about their individual abilities to finance the proceeding or to operate and build the station. They had no basis for believing they could operate the station. Mr. Deiparine is proposed to be the business manager. Mr. Beaver stated in the last hearing session that that is still the plan. Yet, he was not consulted about the operating budget. In fact, the only evidence in the record indicates that no principal was consulted about the budget. Mr. Beaver raised the possibility that Mr. Deiparine could not act as the business manager because he said that Deiparine traveled often. But when Mr. Beaver was asked directly if Deiparine's travels would interfere with his job, Beaver said he did not know Deiparine traveled. Ms. Niehaus, who is the corporate treasurer, was asked if anyone had inquired about where she would obtain $30,000 she had promised to provide. She said that was a "personal" matter. Pontchartrain's principals knew so little about each other and the plans for this proposal that none of them discovered that Ms. Kron was not a citizen and could not be an officer or a director. Mr. Beaver, who was president when it was discovered, could not

remember how it was learned or how changes were made to comply with the law. Ms. Niehaus pointed out that it was Mr. Curet who found out about Ms. Kron's alien status.

56. Overall, Pontchartrain's testimony on this issue is unreliable. Pontchartrain attempted to demonstrate that Mr. Curet's signing or cosigning of notes to finance the proposal was necessary because of time constraints which prohibited Pontchartrain's principals from borrowing the money themselves. Counsel suggested to Beaver that the principals could not go to the bank because they worked. It was pointed out to Beaver that not all Pontchartrain principals worked. Counsel then suggested to Beaver that every principal's signature would have been needed. Mr. Beaver agreed with counsel's statement. When questioned about that, however, Mr. Beaver also agreed he did not know whether the bank required all signatures and he conceded that the bank had taken only Mr. Curet's signature. Moreover, when interest became due, Mr. Curet paid the interest, not Pontchartrain. Mr. Curet never even told Pontchartrain's putative owners that he had paid the interest.

57. Pontchartrain also tried to demonstrate that Mr. Deiparine is financially able to meet his obligations. Mr. Beaver said he knew Mr. Deiparine lived in a "very very nice home." Mr. Curet said Mr. Deiparine had sold his restaurant "at a comfortable figure." But Mr. Deiparine stated that he had no bank accounts, lived on social security and a small Merchant Marine pension. He said he had no money remaining from the sale of his restaurant and he did not own the house he lived in. Mr. Deiparine said he simply did not know where he would get the money to pay his $30,000. He did not know to whom he had paid money for Pontchartrain and he did not know where the money had come from that he had provided. There is little question that Beaver and Curet were making up their testimony to meet the issue without any support for their statements.

58. Pontchartrain has represented that Mr. Curet is no longer involved in its affairs. According to Mr. Beaver, he was fired by the principals of Pontchartrain. Mr. Beaver could not explain why Mr. Curet was fired because he was out of town when it happened. He conjectured that it was because Mr. Curet wanted to be paid for his services when Pontchartrain received money from its new nonvoting shareholder, Unemployment Compensation Control Systems, Inc. When Mr. Beaver was asked whether Mr. Curet had received his money after UCCS bought its stock and lent Pontchartrain money, he said that he had not because his bill was disputed. Mr. Beaver could not explain how the bill was inaccurate.

59. The record is incomplete about Mr. Curet's role today in Pontchartrain's affairs. In any event, whatever his current role, Pontchartrain represented to the Commission that its five voting stockholders exercised control over the applicant. That has not been the case. Mr. Curet controlled every material facet of Pontchartrain's affairs. He went far beyond the role of a local counsel. His role started with the very initiation of the application and the selection of its putative principals. It has continued throughout the licensing process.[5] In fact, Mr. Curet's role did not change until "nonvoting" investors were found and this issue was designated. There is no evidence to support Pontchartrain's claim that its stockholders control its affairs. The record in this proceeding demonstrates that the Commission cannot rely on Pontchartrain's representations. Mr. Beaver's testimony in this long proceeding has been inconsistent and in material respects, dishonest. Pontchartrain is not qualified to become a Commission licensee.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed May 9, 1991, supplemented May 13, and June 11, 1991 by Pontchartrain Broadcasting Company IS DENIED.

IT IS FURTHER ORDERED that the request for official notice and/or acceptance of additional hearing exhibits, filed May 10, 1991 by Pontchartrain Broadcasting Company, Inc. IS DENIED.

IT IS FURTHER ORDERED that the application of Pontchartrain Broadcasting Company, Inc. (File No. BPCT-870330KT) IS DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Pontchartrain's original counsel, Seymour Chase, notified the Commission that he was withdrawing on July 10, 1989. On August 28, 1989, Thomas L. Root notified the presiding officer that he was considering representing Pontchartrain and that he was providing advice to Pontchartrain. On October 18, 1989, Mr. Root entered a notice of appearance. On February 26, 1990, Pontchartrain, but not Mr. Root, informed the Commission that Mr. Root was no longer representing Pontchartrain. Mr. Root represented Pontchartrain at the hearing held November 15 and 16, 1989 and filed proposed findings and conclusions and a reply on the financial issues. Harry C. Martin entered an appearance as Pontchartrain's counsel on March 2, 1990; he remains as Pontchartrain's counsel. Mr. Martin represented Pontchartrain at the prehearing held August 20, 1990 and the hearing held May 13, 1991 on the real party in interest issue.

[2] Louis Jenkins was a party in this proceeding until November 8, 1990. *Memorandum Opinion and Order*, 90M-3584, released November 9, 1990 (approving the settlement agreement filed August 20, 1990, in which Pontchartrain agreed to pay Jenkins $375,000, of which $125,000 is conditioned on a grant of Pontchartrain's application). Jenkins filed proposed findings on the financial issues and conducted discovery on the real party in interest issue.

[3] The Bureau did not participate on issues decided in this supplemental decision until after the financial issues had been heard and discovery had been completed on the real party in interest issue. The Bureau did participate at the hearing held May 13, 1991 on the real party in interest issue and submitted proposed findings on that issue.

[4] Pontchartrain urges that Mr. Beaver helped obtain the letter from Southeast National Bank but Mr. Beaver's testimony does not support that claim. Mr. Beaver did no more than inquire about the current rate and discuss generally with Mr. Jakes that interest rates fluctuate. Tr. 847-48.

[5] After Pontchartrain notified the Commission on February 26, 1990 that it no longer was "associated" with Mr. Curet or Mr. Root, this office called Mr. Beaver on that day to determine who would represent Pontchartrain. Mr. Beaver said he did not know, he would have to contact Jesse LeBlanc to find out. Mr.

LeBlanc is, according to Pontchartrain's July 5, 1990 amendment, the president and director of Great Southern Travel Company, Inc. Great Southern has an agreement with Unemployment Compensation Control Systems, Inc., which permits it to purchase 600 of UCCS's shares in Pontchartrain.

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Application of File No. W-P-C-6638

KEARSARGE
TELEPHONE
COMPANY

To construct and operate cable television facilities within its telephone service area, under the "rural area" exemption of Title VI of the Communications Act of 1934.

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1991; Released: August 23, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Before the Bureau is the application of Kearsarge Telephone Company ("Applicant") for authority under 47 U.S.C. § 214(a) to construct and operate, through an affiliate, cable television facilities within the Town of Wilmot, New Hampshire ("Wilmot"), an area within the Applicant's telephone service area. Applicant alleges that because Wilmot is a "rural area," as defined by 47 U.S.C. § 533 and 47 C.F.R. § 63.58, the Applicant is exempt from the cable-telephone cross-ownership restrictions of 47 U.S.C. § 533 and 47 C.F.R. § 63.54, thereby entitling Applicant to simplified § 214 consideration under 47 C.F.R. § 63.09.

2. Cable One CATV, L. P. ("Respondent") filed a petition to deny the application, and also moved for an investigation of the application on the grounds of material omission. Applicant and Respondent both filed replies. The selectmen of Wilmot filed a letter supporting the Applicant's position, and Respondent filed a letter in reply. For the reasons stated herein, we deny the petition to deny and grant the application.

II. CONTENTIONS

3. Applicant asserts that Wilmot's population of 902 falls well below the threshold of 2500 inhabitants established by the Commission's rules at 47 C.F.R. § 63.58. [1] Therefore, Wilmot states that it escapes the first and second exceptions to being rural in § 63.58(a). *Application for Section 214 Certification*, at 3 ("*Application* "). Furthermore, Wilmot states, it is not included in the third exception in § 63.58(a), because it is not within an "urbanized area" designated by the Census Bureau. Having escaped the three exceptions to being rural, Wilmot states, it is therefore "rural" within the meaning of § 63.58. *Application*, at 3.

4. Respondent replies that Wilmot does not qualify as a "rural area" because it is "contiguous with, and would be physically integrated with, Kearsarge's (Applicant's) cable system serving the Town of New London, New Hampshire, which has over 3000 inhabitants. The rural exemption is inapplicable if even a portion of the cable television service area is nonrural...." *Petition to Deny*, at 1. Respondent cites as Commission policy that "the telephone company's entire cable television service area must be rural in order to qualify for the exemption. The exemption will be inapplicable if the area includes even a portion of a place defined as nonrural in subparagraph (a) or (b) above." *Elimination of the Telephone Company Cable Television Cross-Ownership Rules, Sections 63.54-63.56, for Rural Areas*, CC Docket 80-767, 88 FCC 2d 564 (1981), at37 *["Rural Exemption Order (1981)"]; Petition to Deny*, at 3. Since the Applicant fails to justify a rural exemption, its application must be judged as a waiver request, and that waiver request fails because the presence of Respondent, an alternate cable provider, ready to serve Wilmot, rebuts any presumption for the required showing of "public convenience and necessity." *Petition to Deny*, at 5. Finally, Respondent alleges that the Applicant cannot use its 1982 exemption certificate, to serve the Town of New London, to "bootstrap" itself into a position to receive a subsequent exemption certificate for the Town of Wilmot. *Petition to Deny*, at 7.

III. DISCUSSION AND APPLICATION

5. The rural area exemption, initially adopted by the Commission and later enacted into statute by Congress, was adopted to stimulate the deployment of cable television services to rural areas. *Rural Exemption Order (1981); Cable Communications Policy Act of 1984*, Pub. L. No. 98-549, 98 Stat 2779 (1984), at § 613(b)(3), 47 U.S.C. § 533(b)(3). The Commission's original rules placed some limits on the exercise of the exemption, but in 1984 Congress decided to eliminate "all legal or administrative barriers preventing a common carrier from providing rural cable television service, except the need to certify to the FCC that it is serving a rural area." *House Committee on Energy and Commerce, HR Rep. No. 943, 98th Cong., 2nd Sess. (1984)*, at p. 56. Thereafter, the Commission eliminated restrictions on the exemption, save certifying that the area to be served was "rural" according to the Census Bureau. *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the*

[1] § 63.58 provides that:

> (a) A telephone common carrier shall be exempt from the provisions of §§ 63.54 through 63.56 if the proposed service area contains none of the following:
>
> (1) Any incorporated place of 2,500 inhabitants or more, or any part thereof;
>
> (2) Any unincorporated place of 2,500 inhabitants or more, or any part thereof;
>
> (3) Any other territory, incorporated or unincorporated, included in an urbanized area.

Cable Communications Policy Act of 1984, CC Docket 84-1296, 58 RR 2d 1,67; 47 C.F.R. § 63.09. Thus, the rural exemption provision became one of narrow and strict construction.

6. The Commission's rule speaks of "the proposed service area." 47 C.F.R § 63.58. As used in the rule, "proposed" means the area yet to be served, the area proposed to be served, not the new area to be served plus the area already being served. In *Rural Elimination Order (1981)*, all of the possible "rural area" definitions considered by the Commission dealt with areas the telephone company "proposed to serve with cable television." *Id.*, at 6. When the Commission cautioned that "the telephone company's entire cable television service area must be rural in order to qualify for the exemption," the Commission was using the word "area" to refer to the proposed, but currently unserved, service area. Otherwise, the intent of the exemption would constantly be defeated by aggregating proposed and existing service areas. The exemption contemplates that telephone companies will extend lines from current service areas to provide cable services into adjacent unserved areas. The intent of the exemption is to provide service to unserved rural areas. Thus, "proposed" does not mean the new service area plus the old service area. "Aggregation of population measurements... was never intended." *Ardmore Telephone Co., Inc.*, 56 RR 2d 611,7 (1984) (*Ardmore*). (In *Ardmore*, the petitioner sought to deny an application under the rural exemption by arguing that the population of two towns and a third geographic area should be added together. The Commission declined this interpretation).

7. The "proposed service area" in this application is the Town of Wilmot, not the Town of Wilmot plus the Town of New London. The Town of Wilmot, according to the 1990 Census, has a population of 935, and the town is not included within a Census Bureau designated urbanized area. *Population Totals, State of New Hampshire, 1990 Census*, Bureau of the Census, Department of Commerce, Form D-69, p. 6. Therefore, the Town of Wilmot is a rural area. Having found Wilmot is a rural area, we do not need to reach other issues posed by Applicant and Respondent.

IV. CONCLUSION

8. Applicant has met the requirements of C.F.R. § 63.09, in that the Town of Wilmot is a "rural area" according to the Census Bureau, and, hence, according to § 63.58. There is sufficient evidence that Applicant is franchised to provide cable services to the service area in question. Applicant is therefore entitled, under the provisions of 47 U.S.C. § 214, to construct and operate, through an affiliate, cable television facilities in the Town of Wilmot, New Hampshire.

V. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the application of Kearsarge Telephone Company under § 214 of the Communications Act of 1934, as amended, to construct and operate cable television facilities in the Town of Wilmot, New Hampshire, IS GRANTED.

10. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 1.103(a), this order is effective upon adoption.

11. Kearsarge Telephone Company is afforded thirty-one days from the release date of this order to decline this authorization. Failure to respond within that period will constitute formal acceptance of this authorization.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common
Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC INTERNATIONAL, INC. File No. I-T-C-91-150

Application for authority to acquire and operate facilities for service between the U.S. and Bolivia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 15, 1991; Released: August 23, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Bolivia by the TRT/FTC International, Inc. (TRT/FTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-150 IS GRANTED, and TRT/FTC is authorized to:

a. lease from Comsat and operate six voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the Bolivia furnished by TRT/FTC's correspondent in the Bolivia;

b. lease from AT&T and operate six voice-grade circuits in the Etam, West Virginia earth station;

c. lease and operate necessary domestic connecting facilities; and

d. use said facilities to provide TRT/FTC's regularly authorized services between the U.S. and Bolivia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALPHA LYRACOM CARRIER SERVICES, INC. File No. I-T-C-91-154

Application for authority to establish channels of communications between the U.S. and INTELSAT Satelites for the provision of INTELSAT Business Services

MICRONET, INC. File No. I-T-C-91-155

Application for authority to provide International Television services via INTELSAT Atlantic Ocean Region Satellites.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 15, 1991; Released: August 23, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-91-154 and I-T-C-91-155 ARE GRANTED, and

a. Alpha Lyracom Carrier Services, Inc. is authorized to establish channels of communication between the U.S. and INTELSAT satellites for the provision of Intelnet service, INTELSAT Business Services (IBS) and related digital video services between the U.S. and the overseas points listed in Comsat's Tariff for the space segment of Intelnet, IBS and related digital video services; and

b. MicroNet, Inc. is authorized to establish channels of communication between the U.S. and INTELSAT Atlantic Ocean Region satellites for the provision of International Television Service between the U.S. and the overseas points listed in Comsat's Tariffs for the space segment of International Television Service.[1]

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

5. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicants shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] This authorization is without prejudice to the Commission's ultimate action on the pending Title III application File No. CSG-91-116-ML.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIRALITE COMMUNICATIONS, INC. File No. I-T-C-91-056

For a Certificate Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Establish and Operate Channels of Communication Between the United States and Various Satellite Systems for the Provision of International Data, Voice and Television Service Between the U.S. and Countries in the Atlantic and Pacific Ocean Regions

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 15, 1991; Released: August 23, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-91-056 IS GRANTED, and Miralite Communications, Inc. is authorized to:

a. establish and operate channels of communication between existing and prospective satellite earth stations in the United States and appropriate INTELSAT Atlantic and Pacific Ocean Region satellites for the provision of INTELSAT Business Service (IBS) and international television transmission and reception services between the U.S. and those countries which are listed in Comsat's tariff;

b. establish channels of communication, not to exceed one T-1 circuit, to each country PAS is authorized to serve between existing and prospective satellite earth stations in the United States and the Pan American Satellite system (PAS) for the provision of services not interconnected with the public switched network, including private line service, between the U.S. and those countries PAS is authorized to serve;

c. establish and operate channels of communication, not to exceed three 2.048 Mbps digital streams each consisting of thirty 64 Kbps circuits, between existing and prospective satellite earth stations in the United States and the Soviet Union Intersputnik system for the provision of services, including private line service, not interconnected with the public switched network between the U.S. and the Soviet Union and other Eastern European countries not members of INTELSAT; and

d. establish channels of communications via existing and prospective satellite earth stations for the provision of authorized transborder services via all satellites which have been consulted under Article XIV(d) of the INTELSAT Agreement between the U.S. and Canada and Mexico and from the U.S. to Latin American/Caribbean locations consistent with existing Article XIV(d) consultations.

2. IT IS FURTHER ORDERED that the continued effectiveness to use the Intersputnik system is conditioned on the outcome of a review after six months by the State Department and the Commission as specified in paragraph 11 of the Commission's Order, DA 91-621 (*see* 6 FCC Rcd 2932 (1991)).

3. IT IS FURTHER ORDERED that the applicant shall submit monthly reports detailing the number and capacity of private line circuits in use over the Intersputnik system. The reports shall include Miralite's number and capacity of private line circuits in use over each communications system for the countries served by the Intersputnik system. These reports shall be filed no later than the 20th day of each month and shall include the required information for the previous month.[1]

4. IT IS FURTHER ORDERED that Miralite is restricted in its communications with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (at least one year) of transponder capacity for communications not interconnected with the public switched message networks (except for emergency restoration services).

5. IT IS FURTHER ORDERED that authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

6. IT IS FURTHER ORDERED that Miralite's authorization to provide the services authorized herein using existing or future earth stations is conditioned on those earth stations having the requisite authority to communicate with each of the satellite systems referenced herein.

7. This order is issued pursuant to Section 0.291 of the Commission rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See IDB Communications Group, Inc.*, 6 FCC Rcd 2932 (1991).

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR IV
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (see note 4)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Montserrat	T.V., audio and data receive-only	all satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV,

Turks & Caicos	T.V., audio and data receive-only	Westar IV and V and Comstar D4 all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

ATTACHMENT 3

Countries which PAS-1 is authorized to serve.

Ku-band Countries: Between the U.S. and the Bahamas, Denmark, France, Germany, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and the United Kingdom.

C-band Countries: Between the U.S. and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-235

In re Applications of

JAMES T. DAVIS, TRUSTEE FOR RADIO NEW MEXICO, INC. File No. BR-900531AE

For Renewal of License for
AM Station KVSF,
Santa Fe, New Mexico

JAMES T. DAVIS, TRUSTEE FOR RADIO NEW MEXICO, INC. (Assignor) File No. BAL-900927ED

and

RADIO SANTA FE, INC.
(Assignee)

For Consent to the Assignment of
License of AM Station KVSF,
Santa Fe, New Mexico

ENCHANTMENT MEDIA, INC. File No. BP-900905AE
For A Construction Permit
For a New AM Station
Santa Fe, New Mexico

HEARING DESIGNATION ORDER

Adopted: July 22, 1991; Released: August 23, 1991

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (1) the license renewal application of James T. Davis, Trustee ("Trustee") for Radio New Mexico, Inc., licensee of AM radio station KVSF, Santa Fe, New Mexico [1] ; (2) an application for consent to the assignment of the KVSF license from Trustee to Radio Santa Fe, Inc. ("RSFI"); and (3) the mutually exclusive application of Enchantment Media, Inc. ("Enchantment"), for a construction permit for an AM radio station on 680 kHz, the frequency presently occupied by KVSF. Also before us is a Petition to Deny Application of Enchantment filed jointly by Trustee and RSFI.

2. *Renewal Application for KVSF.* The KVSF renewal application and the Enchantment application are mutually exclusive in that they seek authorization for the same frequency in Santa Fe, New Mexico. Generally, when the Commission receives an application for a new broadcast facility which proposal would interfere with the operation of an existing station for which a renewal application is on file, a comparative hearing must be held between the licensee and the competing applicant to determine which application should be granted. *See* Section 73.3516(e) of the Commission's Rules. In this case, however, the KVSF license is held by Trustee, who is charged with operating the station until assignment of the license can be made to a qualified buyer. Trustee, therefore, seeks to renew the KVSF license in order to assign it to RSFI. The question arises as to which proposals are to be compared in this proceeding.

3. In analogous tripartite situations, the Commission has stated that "the public interest would better be served by comparing the qualifications of the two parties intending to operate the station; namely, the prospective assignee and the construction permit applicant...." *1400 Corp.*, 4 FCC 2d 715, 716 (1966). *See also Cleveland Board of Education*, 87 FCC 2d 9, 10 (1981); *Bronco Broadcasting Co., Inc., et al.*, 50 FCC 2d 529, 536 (1974); *Arthur A. Cirilli, Trustee in Bankruptcy (WIGL), et al.*, 2 FCC 2d 692,693 (1966); *Accord Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc.*, 5 FCC Rcd 2052 (1990). Consequently, because Trustee has been under a continuing obligation to effectuate an assignment of the KVSF license, we find that the most appropriate comparison under the current circumstances would be between RSFI, as the proposed assignee of the license, and Enchantment, the applicant for a construction permit. If Enchantment prevails in the hearing, it will be awarded a construction permit and the renewal application will be denied. If RSFI prevails, the renewal and assignment applications will be granted.

4. *Assignment Application.* Review of the assignment application indicates that RSFI is legally, financially, technically, and otherwise qualified to operate the station as proposed. In this regard, we note that, by Letter dated April 10, 1991, the Chief, Audio Services Division, disposed of objections to the assignment of license of both KVSF and coowned KNYN-FM [2]

5. *Enchantment Application.* On December 18, 1990, Trustee and RSFI (hereinafter "Petitioners") filed, jointly, a Petition to Deny Application, seeking denial of Enchantment's application. In challenging an application pursuant to Section 309(d) of the Communications Act of 1934, as amended, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show .... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]. "47 U.S.C. Section 309(d)(1); *Astroline Communications Com. Co. Ltd. Partnership v. FCC*, 857 F. 2d 1556 (D.C. Cir. 1988); *Dubuque T. V. Limited Partnership,*

[1] The subject renewal application was filed by Radio New Mexico, Inc., Debtor-in-Possession. Since then, the Commission has approved the involuntary assignment of the license to James T. Davis, Trustee (BAL-900621EA, granted August 21, 1990).

[2] The application (BALH-900927EE) for assignment of license of KNYN-FM from Trustee to RSFI was granted that date.

4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1). Petitioners' allegations are not supported in this manner. Thus, the Petition to Deny is subject to dismissal. Nevertheless, we will treat it as an informal objection.

6. Petitioners allege that Enchantment's application was not filed in good faith, but was filed for the purpose of delaying or hindering the grant of another application. In support thereof, Petitioners append several letters purportedly signed by Enchantment principal Bill Sims. In a letter dated June 14, 1990, Sims offers $15,000 for the KVSF license, in order "to eliminate the legal costs" attendant to obtaining the license through other means. In a letter dated June 20, 1990, Sims offers to sell the station which he owns, KMIK, for $50,000, so that he can then "turn around and buy KVSF." In a letter dated December 3, 1990, Sims offers for sale the assets of KMIK, stating that he "could withdraw from the KVSF proceeding." He also suggests "a merger of some kind." Petitioners also allude to an alleged proposal by Sims to withdraw "filings against KVSF-AM" in exchange for $100,000. Sims is alleged to have threatened to file "a further protest" if the proposal was not accepted. Petitioners indicate that these statements were made to Alfredo Sena, "Manager for James T. Davis, CPA, Trustee of the radio station KNYN-FM." No statement by Sena is included.

7. In our view, Petitioners have not established that Enchantment has abused the Commission's processes. Its allegations are unsupported, save by impermissible hearsay. Even assuming the authenticity of the letters supplied by Petitioners, we do not perceive any impropriety. The correspondence consistently suggests that its author is interested in obtaining the license for KVSF. Indeed, it states, more than once, that the author has purchased a "secured position against KVSF and its assets" from a former stockholder. It is not abusive of the Commission's processes to attempt to resolve the matter short of hearing. In fact, we encourage such attempts. *See Prevention of Abuses of the Renewal Process,* 4 FCC Rcd 4780, 4784 (1989) (*dicta*). We have found abuses of the Commission's processes when Commission filings are used as threats, even as part of settlement negotiations. *Gulf Coast Communications, Inc.,* 81 FCC 2d 499,513 (Rev. Bd. 1980), *review denied* FCC 82-128 (1982); *James C. Sliger,* 70 FCC 2d 1565 (Rev. Bd. 1979), *aff'd sub nom. Cumberland v. FCC,* 647 F. 2d 1341 (D.C. Cir. 1980). Here, however, the only suggestion of a threat is in an unsupported reference to a conversation.

8. We do not consider it improper for an applicant to point out the disadvantages of proceeding to hearing, *Sioux Empire,* 9 FCC 2d 850 (Rev. Bd. 1967); or to offer to withdraw an action as part of settlement negotiations. *Dena Pictures, Inc.,* 46 RR 2d 1583, 1587 (Rev. Bd. 1980). Similarly, we hold that an abuse of process has not been shown here. Accordingly, the Petition to Deny Application, when treated as an informal objection, is denied.

9. The applications of RSFI and Enchantment demonstrate that the applicants are legally, financially, technically, and otherwise qualified to operate as proposed. A hearing will be held to compare their qualifications. If Enchantment prevails in the hearing, it will be awarded the construction permit and the renewal application will be denied. If RSFI prevails, the renewal and assignment applications will be granted.

10. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order,* upon the following issues:

(1) To determine which of the proposals would, on a comparative basis, better serve the public interest; and

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

11. IT IS FURTHER ORDERED, That the Petition to Deny Application of Enchantment IS DISMISSED, and, when treated as an informal objection, IS DENIED.

12. IT IS FURTHER ORDERED, That, a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of an opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *Order,* file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order.*

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of proceeding, the full text of the issue and the applicants to which it applies are set forth in an Appendix to this Notice. A copy of the complete Hearing Designation Order in this proceeding is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, N.W., Washington, D.C. 20554. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20037 (Telephone [202] 857-3800).

FEDERAL COMMUNICATIONS COMMISSION

Stuart B. Bedell, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-227

In the Matter and Applications of

NEWSOUTH BROADCASTING, INC. File No. BTCCT-900305LD
BTCCT-910308KE
WFXL(TV), Albany, Georgia

Order to Show Cause Why the License of WFXL(TV) Should Not Be Revoked; Application for Transfer of Control; and Application for Transfer of Control to NewSouth Broadcasting, Inc., Debtor-in-Possession

TIMOTHY S. BRUMLIK File Nos. BLTVL-891107JE
Permittee of BAPTVL-900105IA
Low Power Television BAPTVL-910607IB
Station W07BZ, Orlando, Florida

Order to Show Cause Why the Permit of W07BZ Should Not Be Revoked; Application for License to Cover Construction Permit; Application for Assignment of Construction Permit to Robert Sandusky; and Application for Assignment of Construction Permit to Timothy S. Brumlik, Debtor-in-Possession

NEWSOUTH MEDIA CORPORATION File Nos. BMPTVL-900129IA
BAPTVL-900105IC
Permittee of Low Power Television Station W12CD, Altamonte Springs, Florida

Order to Show Cause Why the Permit of W12CD Should Not Be Revoked; Application for Modification of Construction Permit; and Application for Assignment of Construction Permit to Televista, Inc.

NEWSOUTH BROADCASTING, INC. File Nos. BMPTVL-900125IA
BMPTVL-891208R4
BLTVL-900125IB
Permittee of BAPTVL-900703IE
Low Power Television
Station W13B0, Valdosta, Georgia

Order to Show Cause Why the Permit of W13BO Should Not Be Revoked; Application to Replace Expired Construction Permit; Application for Modification of Construction Permit; Application for License to Cover Construction Permit; and Application for Assignment of Construction Permit to General Management Consultants, Inc.

TIMOTHY S. BRUMLIK File Nos. BAPTVL-900105IB
Permittee of BMPTVL-910301JG
Low Power Television BAPTVL-910607IC
Station W12CC, Cocoa, Florida.

Order to Show Cause Why the Permit of W12CC Should Not Be Revoked; Application for Assignment of Construction Permit to Robert Sandusky; Application for Extension of Construction Permit; and Application for Assignment of Construction Permit to Timothy S. Brumlik, Debtor-in-Possession

NEWSOUTH BROADCASTING, INC. File No. BPTVL-870702TX
Lumber City, Georgia

For a Construction Permit for a New Low Power Television Station

ORDER TO SHOW CAUSE AND HEARING DESIGNATION ORDER

Adopted: July 26, 1991; Released: August 23, 1991

By the Commission:

1. The Commission has before it for consideration: (a) the license held by NewSouth Broadcasting, Inc. (NSBI) for Station WFXL(TV), Albany, Georgia, a Fox affiliate; (b) the construction permit held by NSBI for low power television Station W13BO, Valdosta, Georgia; (c) the construction permit held by NewSouth Media Corporation (NSMC) for low power television Station W12CD, Altamonte Springs, Florida; (d) the construction permits held by Timothy S. Brumlik (Brumlik) for low power television Stations W07BZ, Orlando, Florida and W12CC, Cocoa, Florida; (e) an application by NSBI for a construction permit for a new low power television station at Lumber City, Georgia; (f) various applications relating to the aforementioned stations; and (g) Brumlik's Petition for Emergency Relief and Expedited Action, filed on September 21, 1990, as supplemented on November 29, 1990.

2. As the President and owner of NSBI and NSMC, Brumlik effectively holds the license for WFXL(TV), Albany, Georgia, as well as the four above-stated low power

television construction permits. On January 22, 1990, Brumlik pleaded guilty to money laundering, in violation of Title 18, United States Code, Section 1956(a)(3)(B), which is a felony punishable by a term of imprisonment of up to 20 years and/or a fine of up to $500,000. According to his testimony in United States District Court in connection with his agreement to plead guilty, Brumlik admitted laundering money from the proceeds of illegal drug-related activity. Specifically, immediately prior to the judge's acceptance of the guilty plea, and in response to questions from the judge, Brumlik admitted that, prior to his entering into the transaction at issue, it had been represented to him that the money involved was "Drug proceeds" from "illegal drug activity, namely cocaine" (Tr. at 38-41). Brumlik entered into a transaction "to conceal, disguise the nature, location and source and ownership and control" of that money (Tr. at 40). Subsequently, Brumlik was sentenced to four years imprisonment and fined $75,000.

3. On March 5, 1990, Brumlik filed a transfer of control application for WFXL(TV), and on July 2, 1990, he filed an assignment application for W13BO, Valdosta, Georgia. [1] Regarding WFXL(TV), Brumlik proposes to sell all of the stock of NSBI to Manuel Cantu, the station's current general manager. In payment for his stock, Brumlik has agreed "to accept a total consideration of assumption of all debt and repayment of total equity investment," not to exceed $2.5 million. In this connection, Cantu has agreed to execute a promissory note in the amount of $2.5 million to Brumlik, bearing an annual interest rate of 10%. Regarding W13BO, Brumlik proposes to sell the assets of the station for $34,000, plus $25,000 in air time, and $2,500 for the satisfaction of past costs of WFXL(TV). Also, Brumlik would receive an additional $38,000 under the contract.

4. In our *Public Notice*, released September 29, 1989, 4 FCC Rcd 7533 (1989), we noted that we regard drug trafficking as a matter of the gravest concern and that we intend to apply policies that reinforce both private and Governmental efforts to eradicate drug trafficking. In this regard, we noted our intent to take all appropriate steps, including license revocation proceedings, where information comes to our attention that FCC licensees or their principals have been convicted of drug trafficking. Moreover, in our *Policy Statement and Order*, 5 FCC Rcd 3252 (1990), *pet. for recon. on other grounds pending*, we stated that evidence of any felony conviction would be relevant to our evaluation of an applicant's or licensee's character. Consequently, Brumlik's January 1990 felony conviction raises substantial and material questions as to whether Brumlik, NSBI and NSMC possess the requisite qualifications to be or remain a licensee and/or permittee of the above-referenced stations, and whether the public interest, convenience and necessity would be served by grant of the above-referenced applications.

5. On September 21, 1990, Brumlik filed a "Petition for Emergency Relief and Expedited Action," requesting that he be allowed to transfer WFXL(TV) and LPTV stations W12CD, W07BZ and W12CC pursuant to the Commission's Minority Distress Sale Policy. That petition was supplemented on November 29, 1990. *See Minority Ownership of Broadcasting Facilities*, 68 RR 2d 979 (1978). In this regard, Brumlik notes that the proposed transferee of WFXL(TV) is Hispanic but that the proposed assignees of the three LPTV stations "do not meet the standard for distress sales." Brumlik does not address the sale of his fourth LPTV station, W13BO.

6. Brumlik's petition will be denied. Brumlik himself has conceded that only one of the proposed transactions meets the threshold requirements of our distress sale policy. Furthermore, Brumlik has not demonstrated that the public interest would be served by permitting a person who has been convicted of a drug money laundering felony to receive money for the sale of his stations. Nor do countervailing concerns over the administrative burdens attendant upon a hearing to revoke Brumlik's license warrant a different result. We note that because there has been a conviction, there is unlikely to be a protracted hearing regarding the relevant facts. Thus, the distress sale policy's goal of avoiding protracted hearings would not be meaningfully advanced by permitting a distress sale in this case. Consistent with our prior statements that the seriousness of particular licensee misconduct and the concommitant need to deter its recurrence may in certain limited cases outweigh the benefits of minority participation to be gained from permitting distress sales, [2] we deny grant of a distress sale in this case. *Cf. Williamsburg County Broadcasters Corp.*, 5 FCC Rcd

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[1] While Brumlik has filed assignment requests for WO7BZ and W12CC, to Robert Sandusky, and an assignment request for W12CD to Televista, Inc., he has not submitted sales contracts for these stations, as required by the instructions to the application. Nevertheless, for administrative convenience, we are including those applications in this proceeding. Further, on June 7, 1991, Brumlik submitted applications to assign W07BZ and W12CC to himself as debtor-in-possession, stating that he has filed for such relief in U.S. Bankruptcy Court in Albany, Georgia.

[2] *Northland Television, Inc.*, 72 FCC 2d 51, 54 (1979); *Petition for Issuance of Policy Statement*, 44 RR 2d 1051, 1056 (1978), *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979,983 (1978). We note that in *Faith Center, Inc.*, 99 FCC 2d 1164, 1172 n. 16 (1984) (subsequent history omitted), the Commission said with respect to allegations that the nature of the misconduct at issue should preclude distress sale relief: "Even if the allegations are assumed to be true, they would not prevent us from approving the distress sale herein and do not require any action by us at this time, since the renewal applicant's qualifications are not a relevant consideration in a distress sale situation." We believe this sentence was intended merely to confirm that the Commission is not "prevent[ed]" from approving a distress sale involving serious misconduct. Any other interpretation would be inconsistent with the Commission's interpretation, contemporaneous with adoption of the distress sale policy, that the distress sale policy is not a "rigid rule, "*Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d at 983, and that "our review of applications for distress sale relief necessarily involves the balancing of increased minority participation and reduced procedural burdens in hearing on the one hand, with the need to preserve substantial deterrents to licensee misconduct which are essential to the integrity of the licensing process." *Petition for Issuance of Policy Statement*, 44 RR 2d at 1056. We have no reason to believe that the Commission intended in *Faith Center* to alter its original intentions with regard to retaining flexibility in implementing the distress sale policy, and we decline to interpret *Faith Center* as taking away such flexibility. Nothing in the Supreme Court decision affirming *Faith Center* is inconsistent with our interpretation here. *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997. We also note that nothing in the Appropriations Act restrictions regarding changes in the distress sale policy limits our discretion to take into account national

3034 (1990) (drug conviction by licensee principal warrants revocation hearing on character grounds); *see also* Anti-Drug Abuse Act of 1988, 21 U.S.C. §853 a (authorizes judges to deny all federal benefits to those convicted of drug trafficking or possession). We emphasize that our decision in this case turns on the unique importance of this nation's war against drugs as reflected in the Anti-Drug Abuse Act of 1988 and other congressional and presidential actions. [3] Thus, in the vast majority of instances, we expect to continue routinely to approve distress sales that otherwise meet the criteria of our distress sale policy. [4]

7. Accordingly, IT IS ORDERED, that pursuant to Title 47, United States Code, Section 312(a), Timothy S. Brumlik, NewSouth Media Corporation and New South Broadcasting, Inc. ARE DIRECTED TO SHOW CAUSE, why the license of WFXL(TV), Albany, Georgia, and why the construction permits of low power television stations W07BZ, Orlando, Florida, W12CD, Altamonte Springs, Florida, W13BO, Valdosta, Georgia, and W12CC, Cocoa, Florida, Should Not Be REVOKED, at a hearing to be held at a time and place specified in a subsequent Order, upon the following issue:

(a) To determine, in light of Timothy S. Brumlik's conviction for violating Title 18, United States Code, Section 1956(a)(3)(B), whether Brumlik, NewSouth Broadcasting, Inc. or NewSouth Media Corporation possess the requisite qualifications to be or remain a licensee and/or permittee of the above-captioned television and low power television stations.

In addition, if it is determined that revocation of the above-referenced stations is not warranted:

(b) to determine, pursuant to Section 309(e) of the Communications Act, whether grant of the captioned applications, if any, will serve the public interest, convenience and necessity.

8. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, is directed to serve upon Brumlik, NSBI and NSMC, within thirty (30) days of the release of this Order, a Bill of Particulars with respect to Issue (a), above.

9. IT IS FURTHER ORDERED, That pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Mass Media Bureau as to Issue (a).

10. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, both the burden of proceeding with the introduction of evidence and burden of proof with respect to issue (b), shall be upon Brumlik, NSBI and NSMC.

11. IT IS FURTHER ORDERED, That Brumlik's Petition For Emergency Relief and Expedited Action IS DENIED.

12. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the parties, pursuant to Section 1.91(c) of the Commission's rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order a written appearance stating that they will appear at the hearing and present evidence on the matters specified in the Order. If a party fails to file an appearance within the time specified, the right of that party to a hearing shall be deemed to have been waived. See Section 1.92(a) of the Commission's rules. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order. See Section 1.92(a) of the Commission's rules. In the event the right to a hearing is waived by all the parties to this proceeding, the presiding officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. See Section 1.92(c) of the Commission's rules.

13. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, send a copy of this Order by Certified Mail - Return Receipt Requested to:

Aaron P. Shainis, Esquire
Baraff, Koerner, Olender & Hochberg
5335 Wisconsin Avenue, N.W., Suite 300
Washington, D.C. 20015-2003

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drug policy in deciding whether a particular distress sale serves the public interest, convenience and necessity. *See* Pub. L. No. 101-515 (1990).

[3] *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (1988); Federal Drug Free Workplace Act, Pub. L. No. 100-71 (1987); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 (1986); Comprehensive Crime Control Act of 1984; Pub. L. No. 98-473 (1984); Executive Order 12696, President's Drug Advisory Council, 54 Fed. Reg. 47,507 (1989); Executive Order 12595, White House Conference for a Drug Free America, 52 Fed. Reg. 17,383 (1987); Executive Order 12590, National Drug Policy Board, 52 Fed. Reg. 10,021 (1987); Executive Order 12564, Drug-Free Federal Workplace, 51 Fed. Reg. 32,889 (1986).

[4] By letter of December 10, 1990, and in December 27, 1990 "Comments on Brumlik's Petition for Emergency Relief and Expedited Action," counsel for the Summit Bank of Indianapolis, a creditor of Station WFXL, requested that the Commission withhold any action in this matter pending the outcome of a civil proceeding seeking appointment of a court-appointed receiver for the station. On January 24, 1991, W. Carl Gordon, Jr. filed comments in support of the assignment application and requested that the Commission take no action which will harm innocent creditors. We believe that the public interest is better served by continuing with our normal processes. We note in this regard that there appears to be no prejudice to creditors if a receivership is approved in the state court proceeding. *Second Thursday*, 22 FCC 2d 515 (1970).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 1991; Released: August 19, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On May 17, 1991, the Bureau released our Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established a filing date of August 19, 1991, for price cap LECs' first automated quarterly service quality and annual infrastructure reports, [3] and a September 30, 1991, filing date for the second quarterly service quality report as well as the annual infrastructure report covering calendar year 1989.[4] On August 8, 1991, New York Telephone Company and New England Telephone and Telegraph Company (together, NYNEX) filed a petition for waiver of some of the filing requirements for the September 20, 1991, infrastructure report covering calendar year 1989. In this Order we grant that petition.

2. NYNEX states that it is unable to provide lines 330-363 (interoffice working facilities) and lines 480-484 (other transmission facility data) for 1989, since the mechanized system containing the data operates on-line and retains only certain historical information, not including the above. These lines were completed for NYNEX's 1990 infrastructure report, and will be included in all future reports. It is only the 1989 data that is unavailable.

3. We find that NYNEX has narrowly defined its waiver request and has shown good cause why it should be granted. We therefore grant NYNEX's request.

4. Accordingly, IT IS ORDERED that the request for waiver filed by New York Telephone Company and New England Telephone and Telegraph Company in the above-captioned proceeding on August 8, 1991, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com.Car.Bur. 1991) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCCRcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D. C. PSC* v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[3] On July 1, 1991, the price cap LECs filed the first quarterly service quality and annual infrastructure reports in hard copy only. This filing was reviewed by Bureau staff, and prompted the Bureau's Memorandum Opinion and Order of August 2, 1991, directing LECs to bring their filings into conformance with the Bureau's instructions or, where that is not possible, apply for waivers. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, DA 91-963, released Aug. 2, 1991 (*August 2 Order*).

[4] The infrastructure reporting requirements were derived by the Commission from a set of filing requirements originally established in CC Docket No. 89-624, the rate of return represcription proceeding. In that docket, the Bell Operating Companies and GTOC filed historical infrastructure data for each year from 1980 on, and projected data for each year until 1994. The reporting requirements for price cap LECs infrastructure reporting are very similar to those. The Commission decided that, in the interest of maintaining continuity in this data, price cap LECs should file historical infrastructure data to cover calender year 1989 (which was included in the Docket 89-624 data in projection, and would otherwise be excluded from historical data since it precedes these LECs' entry into price cap regulation).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-188

In the Matter of

Amendment of Section 73.202(b), RM-6936
Table of Allotments,
FM Broadcast Stations.
(Santa Rosa and Tucumcari, New Mexico)

MEMORANDUM OPINION AND ORDER
(ProceedingTerminated)

Adopted: August 13, 1991; Released: August 23, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Don R. Davis (petitioner) of the Report and Order, 6 FCC Rcd 2592 (1991), which dismissed the proposal, initiated on the Commission's own motion, to substitute Channel 240C3 for Channel 240A at Santa Rosa, New Mexico, and modify his construction permit for Station KHWY, as well as petitioner's counterproposal to substitute Channel 241C1 for Channel 240A, re-allot the channel from Santa Rosa to Tucumcari, New Mexico, and modify Station KHWY's construction permit accordingly.

2. Section 1.429 of the Commission's Rules and Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, state that petitions for reconsideration must be filed within 30 days of public notice of a Commission decision. The Report and Order in this proceeding was published in Federal Register on May 21, 1991, but petitioner failed to file his reconsideration request until July 24, 1991.

3. Except where the Commission fails to provide notice of its decisions to parties, as required by our Rules, we lack the authority to extend or waive the 30 day period specified in the Communications Act. *See, e.g.,* Reuters Ltd. v. FCC, 781 F.2d 946, 951-52 (D.C. Cir 1986); Mary R. Kupris, 5 FCC Rcd 5142 (1990). Petitioner acknowledges that he received a copy of the Report and Orderin early May, 1991. Therefore, we lack authority to waive the 30 day period for filing petitions for reconsideration and decline to do so.

4. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Don R. Davis IS DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of Open Network
Architecture Plans

ORDER

Adopted: August 8, 1991; Released: August 23, 1991

By the Commission:

1. The *BOC ONA Order* [1] announced the establishment of a Federal-State Joint Conference (Joint Conference) pursuant to Section 410(b) of the Communications Act, [2] as an ongoing forum for state and federal cooperation to facilitate the development and implementation of Open Network Architecture (ONA). The Order stated that the Joint Conference members would include the Chairman of this Commission, who will serve as Joint Conference chairman, one additional member of this Commission, and seven state commissioners, one from each Bell Operating Company region. On May 4, 1989, the Joint Conference was expanded to include one additional federal Commissioner and six additional state Commissioners. [3] The Order also provided that we would appoint members from the state commissions in consultation with the National Association of Regulatory Utility Commissioners (NARUC).

2. A vacancy on the Joint Conference has occurred as a result of the departure of the Honorable Rich Kowalewski, Commissioner of the Kansas Corporation Commission. NARUC has nominated the Honorable Kenneth McClure, Commissioner, Missouri Public Service Commission, to fill the vacancy created by the departure of the Honorable Rich Kowalewski. We hereby appoint the Honorable Kenneth McClure to serve as a member of the Joint Conference. Henceforth a copy of all filings in these proceedings shall be served on the Honorable Kenneth McClure at the following address:

The Honorable Kenneth McClure
Commissioner
Missouri Public Service Commission
Post Office Box 360
Truman State Office Building
Jefferson City, Missouri 65102
(314) 751-4221

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 410(b) of the Communications act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 410(b), that the Kenneth McClure, Commissioner of the Missouri Public Service Commission, IS APPOINTED as a member of the Federal-State Joint Conference convened in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1,110, paras. 214-223 (1989) (*BOC ONA Order), pets. for recon. pending; app. for review pending sub nom., Pacific Bell and Nevada Bell v. FCC,* No. 89-1194 (D.C. Cir.) .

[2] 47 U.S.C. § 410(b).

[3] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 4017 (1989) (*May 4 Joint Conference Order).* The Commission increased state membership on the Joint Conference from seven to thirteen members at the request of NARUC.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	File Nos.: 22299-CD-P/ML-1-91
	22300-CD-P/ML-1-91
PacTel Paging, Inc.	22301-CD-P/ML-1-91
	22302-CD-P/ML-1-91
for paging stations at	22303-CD-P/ML-1-91
various locations in Michigan	22229-CD-P/ML-1-91

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1991; Released: August 23, 1991

By Chief, Mobile Services Division:

I. INTRODUCTION

1. By letter dated March 8, 1991, PacTel Paging, Inc. (PacTel) requested that the Mobile Services Division (MSD) reconsider its decision returning the captioned PacTel's applications to increase power at six perimeter 931 MHz base station locations operating on frequency 931.5875 MHz. The applications for base stations in the Public Land Mobile Service (PLMS) in Michigan were returned for failure to comply with the requirements of Section 22.505 of our rules.[1]

2. PacTel filed applications to increase power at eighteen class L base stations in Michigan. Some of those applications were for interior sites, and some were for exterior sites. All but one of the exterior applications have been returned. One application, file No. 22229-CD-P/ML-1-91, is being held by the MSD pending this order on reconsideration. For the reasons set forth below, we grant reconsideration.

II. DISCUSSION

3. We returned PacTel's applications stating that those applications failed to comply with our rules because they increased power at perimeter cells in excess of that permitted by Section 22.505. In this order on reconsideration we hope to clarify the permissible and impermissible increases allowed to 931 MHz base stations.

4. All 931 MHz base stations when initially licensed to serve new territory must meet the height and power requirements of Section 22.505. These stations will be licensed as class L stations, regardless of their classification under Section 22.502. A class L station, by definition, has a 20 mile service contour and a 50 mile interference contour. 47 CFR §22.504(b)(2). A composite interference contour, for a given frequency, is established by combining the individual perimeter class L station interference contours for base stations in a paging system.[2] Any new perimeter station added to a paging system will create a new composite interference contour.

5. Perimeter stations may not exceed the power and height limitations set for a class L station. 47 CFR §22.502. [3] The Commission has determined that it will permit an increase in power or height at a perimeter 931 MHz base station provided that the power or height increase maintains the class L status of the station in accordance with the provisions of 22.502(c).[4] Power and height limits allowed for class L stations, as determined by §22.502, do not result in a change in the classification of the station under §22.505. For example, a perimeter station with an antenna height above average terrain of no greater than 580 feet would initially be limited to a maximum of 1000 watts effective radiated power pursuant to Section 22.505. However, that station can raise its power to 3500 watts e.r.p. under Section 22.502. This is possible because the increases will not alter the existing composite interference contours. Height or power increases at 931 MHz base stations that would classify a station as a class F, G, H, or K station under §22.502 are only permitted at interior sites, otherwise the change in power or height would result in a change in the composite interference contour. 47 CFR §22.504(b)(2). In summation, no station may increase its power so much that the composite interference contour is expanded. However, the increases may increase the composite service contour.

6. Initially, PacTel filed applications for class L stations. The modification applications it filed to increase power at the perimeter sites did not exceed the class L specifications under 22.502(c). Therefore, the proposed power increases did not expand the composite interference contours, and PacTel's applications were acceptable as originally filed. Accordingly, we grant reconsideration.

III. ORDERING PARAGRAPH

7. IT IS HEREBY ORDERED THAT the Petition for Reconsideration filed on behalf of PacTel Paging, Inc. of Michigan is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See*, 47 CFR §22.505, which sets forth in a chart the effective radiated power allowed for different antenna heights above average terrain for a 931 MHz base station.

[2] A composite interference contour connects the outermost points of the intersecting interference contours for the base stations in a paging system. An interior site is one which has an interference contour totally contained within the composite interference contour. None of the points on an interior site's interference contour may be on the composite contour. A perimeter (exterior) site has one or more points of its interference contour on the composite interference contour. (*See* diagram attached as Exhibit 1.)

[3] Interior stations may be granted increases in height or power of greater than the amount allowed for a class L station. Such increases will result in a change in the classification of the station to a class K, H, G or F station. Each of these classes of stations has service and interference contours defined in §22.504 of our rules. A station may only operate a a class K, H, G or F station if the composite interference contour of the paging sys-

tem is not expanded. *See*, 47 CFR §22.506(f)(2). Because class K, H, G, or F interference contours are greater than those of a class L station, no perimeter station may increase its power so much that it would be required to change to become a class K, H, G or F station.

[4] This increase is possible notwithstanding the limitations initially set in Section 22.505 of the Commission's rules. 47 CFR §22.505.

EXHIBIT 1

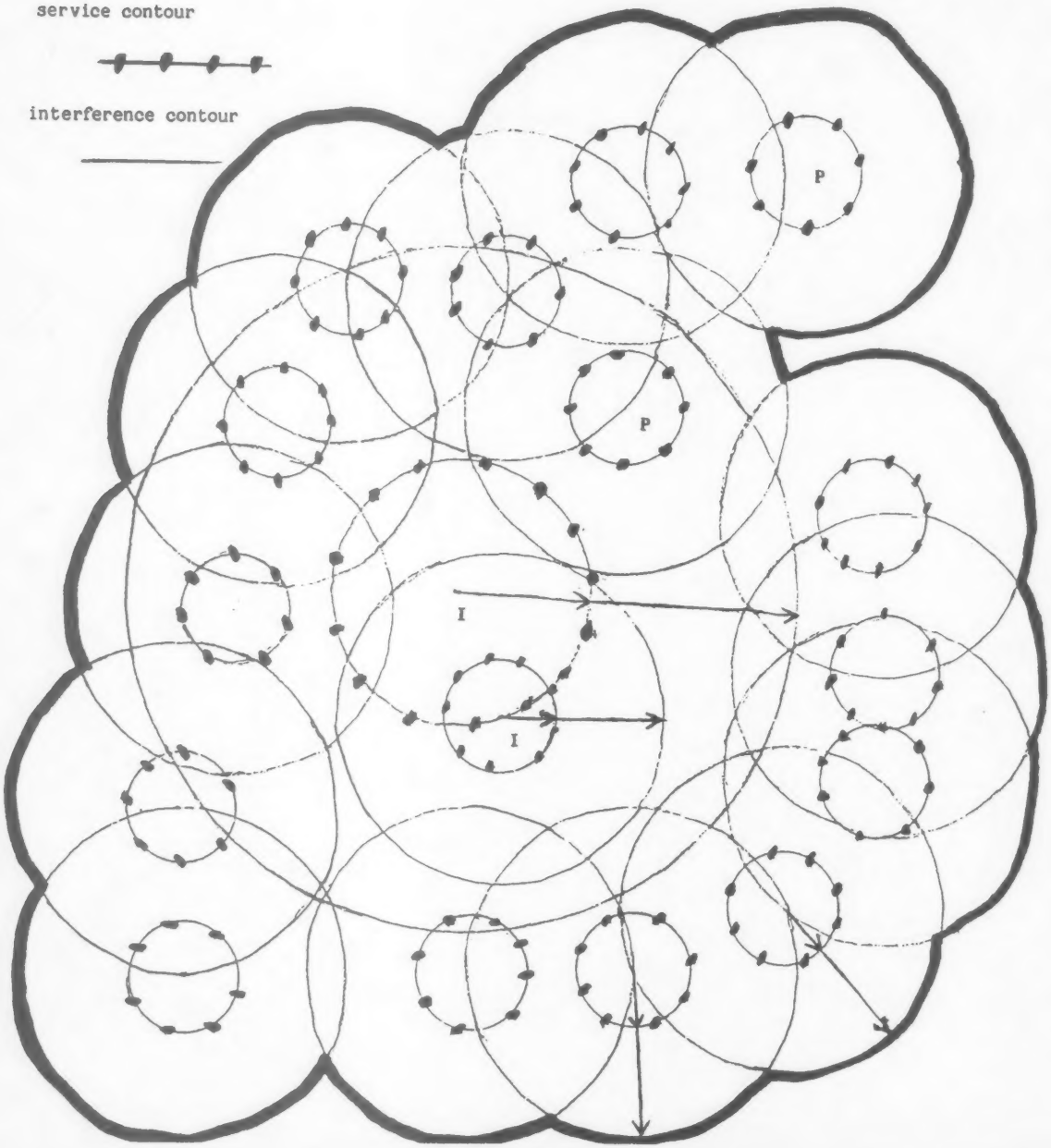
composite interference contour

service contour

interference contour

I - indicates an interior site

P - indicates a perimeter site



Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY WDIX, Yadkinville, North Carolina — File No. BP-870331BK

For a Construction Permit
For a Modification of Facilities

TRIAD NETWORK, INC. Greensboro, North Carolina — File No. BP-870928AA

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1991; Released: August 19, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. In a *Memorandum Opinion and Order*, FCC 91M-2337, released July 30, 1991, Administrative Law Judge Edward J. Kuhlmann denied Robert Carroll Rickenbacker, Jr.'s request for leave to intervene as a party in this proceeding.[1] On August 2, 1991, Rickenbacker filed an appeal from the ALJ's ruling as well as a motion to stay his deposition appearance, now scheduled for August 8, 1991, until the Board has acted on his appeal.[2]

2. The Board will deny Rickenbacker's stay request. Under the well-established doctrine of *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), as modified by *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), such requests must be supported by, *inter alia*, a showing that petitioner will incur irreparable injury in the absence of a stay. *See Cannon Communications Corp.*, 6 FCC Rcd 3310 (1991). Here, appellant has plainly failed to meet this necessary requirement. Rickenbacker essentially argues that his interest is in conflict with Palmetto and cannot be represented, as the ALJ allegedly assumed, by Palmetto's counsel at the upcoming deposition session. A careful reading of the ALJ's *Order*, however, makes clear that he has already indicated that Rickenbacker may be separately represented by his own counsel. *See id.*, at para. 3 ("There is, of course, nothing to prevent Rickenbacker from consulting a lawyer about his deposition or testimony . . . ") And more precisely, 47 CFR § 1.27 specifically accords Commission witnesses the right to counsel. That is, "any individual compelled to appear in person in any Commission proceeding may be accompanied, represented, and advised by counsel . . . " and "counsel for the witness will be permitted to make objections on the record . . . in connection with any examination of his client." *Id.* Thus, Rickenbacker's immediate concern as to his right to representation by independent counsel of his choice is alleviated, and there is no present basis to stay the upcoming deposition session.

3. ACCORDINGLY, IT IS ORDERED, That the Motion for Stay, filed August 2, 1991, by Robert Carroll Rickenbacker, Jr. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Candor/misrepresentation and Section 1.65 reporting issues were added against Palmetto by the Board in a remand *Memorandum Opinion and Order*, 6 FCC Rcd 2193 (Rev. Bd. 1991), stemming from allegations by Palmetto's two 50% general partners, Rickenbacker and William B. Hallman, accusing each other of misrepresenting Palmetto's actual ownership composition since November 1989.

[2] On August 6, 1991, the Chief, Mass Media Bureau filed an opposition to the motion for stay. Rickenbacker's appeal will be acted upon in due course following completion of the pleading cycle.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-313
Phase II

In the Matter of

Policies and
Rules Concerning
Operator Service Providers

In the Matter of

Stuart A. Whitaker FOIA Control No. 91-129

On Request for Inspection
of Records

MEMORANDUM, OPINION AND ORDER

Adopted: August 13, 1991; Released: August 16, 1991

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION

1. The Common Carrier Bureau has received a Freedom of Information Act (FOIA) request, filed by Stuart A. Whitaker of Whitaker Associates (Whitaker), seeking access to monitoring reports submitted to the Commission by operator service providers (OSPs) in CC Docket No. 90-313, Phase II, *Policies and Rules Concerning Operator Service Providers*. [1] Approximately 200 OSPs filed monitoring reports, [2] most requesting confidential treatment for at least some portion of their report. For the reasons set forth below, Whitaker's request for inspection is partially granted and partially denied.

II. BACKGROUND

2. The Telephone Operator Consumer Services Improvement Act of 1990 [3] (TOCSIA) directed the Commission to, *inter alia*, monitor various practices of OSPs related to the rates charged, costs incurred, services offered, and incidence of complaints, and to report the findings to Congress. The Commission found that in order to apprise Congress fully, it would be necessary to collect information beyond that included in informational tariffs that, under TOCSIA, are required to be filed with the Commission by OSPs. *Policies and Rules Concerning Operator Service Providers*, Further Notice of Proposed Rulemaking, 6 FCC Rcd 120, 122 (1990). The Commission delegated to the Common Carrier Bureau authority to decide precisely what information should be filed by OSPs. *Id.* at 124. The Bureau ordered OSPs to file, according to a schedule for specified reporting periods, four reports consisting of (1) compilations of rates, including the percentage change in each rate element since the date of the previous report; (2) the incidence of complaints for six specified categories relating to OSP operations; and (3) cost data showing total capital investment, total expenses, total revenues, amounts of commissions and surcharges paid, costs for billing and validation, and total salaries and other benefits to officers and employees. *Policies and Rules Concerning Operator Service Providers*, Order, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*). The Bureau stated that cost data would be withheld from routine public inspection to the extent that it is not already publicly available. *Id.* at 2317. OSPs were required to file their first report by June 21, 1991 for the period January 1, 1991 to April 30, 1991. It is these reports that Whitaker has invoked the FOIA to obtain.

III. DISCUSSION

3. Under the FOIA's disclosure mandate, all records held by federal agencies, including those received from outside parties, must be released upon request unless they fit within the scope of one or more of nine narrow exemptions to disclosure. As indicated above, most of the roughly 200 OSPs who have submitted monitoring reports have requested that at least some portion be held confidential. Many parties have reiterated or expanded their confidentiality claims in response to the Whitaker FOIA request. Some parties have requested that only cost data be withheld from public inspection, while others seek protection for additional information, including that relating to complaints and percentages of hotel and public traffic. A number of OSPs have asked that their entire report be withheld. For still others, it is not precisely clear what information is being claimed to be confidential.

4. Although most OSPs have failed to articulate a basis for their confidentiality claims, those parties that have sought to explain why their submissions should be withheld rely on Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), and the Commission's parallel regulations regarding our treatment of sensitive business data, 47 C.F.R. §§ 0.457(d), 0.459. In addition, at least one party has claimed that there is an independent bar against disclosure under the Trade Secrets Act, [4] a criminal statute which prohibits the unauthorized release of business data by government employees and imposes sanctions for such disclosure. This argument, although referenced only briefly, appears to raise the issue of whether the monitoring reports can be withheld under Exemption 3 of the FOIA.

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[1] Whitaker has asked that fees associated with the processing of his request be waived. Although the Bureau has spent considerable time on various activities related to the FOIA action (*e.g.*, preparing mailing lists and notifying submitters), the time spent on properly assessable search and review activities has been negligible. Thus, no fees can be charged. 47 C.F.R. § 0.470(f).

[2] OSPs who have filed monitoring reports are listed in Appendix A.

[3] 47 U.S.C. § 226.

[4] 18 U.S.C. § 1905.

5. Exemption 3 incorporates disclosure prohibitions contained in other federal statutes into the FOIA. Under Exemption 3, an agency may protect materials "specifically exempted from disclosure by statute. ... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

6. While satisfaction of any one of the requirements set forth by Exemption 3 is sufficient to place a statute within the exemption's protective ambit, courts have held that the Trade Secrets Act fails to meet a single criterion. *See CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1137-42 (D.C. Cir. 1987), *cert. denied sub nom. CNA Financial Corp. v. McLaughlin*, 485 U.S. 977 (1988) and cases cited therein. In the first place, the prohibition against release set forth in the Trade Secrets Act is not absolute since it only reaches disclosures "not authorized by law." *Id.* at 1138. Secondly, the statute does not fit under either aspect of subpart (B) of the exemption since it neither contains meaningful guidance for an agency to apply in determining whether materials should be withheld nor identifies specific discrete materials that are to be withheld. *Id.* at 1139-41. In fact, the "encyclopedic" listing of specific categories of data contained in the Trade Secrets Act is so broad that it can be reduced to a single encompassing category of all commercial or financial data which could, under the statute, be withheld or disclosed virtually "at the whim of an administrator." *Id.* at 1140-41. While it has been established that the Trade Secrets Act does not present an independent basis for withholding under Exemption 3, the statute has been interpreted to match the protection afforded to sensitive business data by Exemption 4. *Id.* at 1151.

7. Exemption 4 of the FOIA and Section 0.457(d) of the Commission's Rules permit the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Although most parties seeking confidential treatment do not specifically reference either Exemption 4 of the FOIA or the Commission's implementing regulations as a basis for their claims, it is these provisions that are applicable to a determination whether private business records may be withheld from a party seeking access under the FOIA.

8. The protective scope of Exemption 4 has been established principally through judicial interpretation and some of the terms employed have very specific meanings peculiar to the context of the exemption. For instance, although courts have applied the commonly understood definitions for the terms "commercial" and "financial," designation of materials as "trade secrets" is limited to a very narrow and discrete class of information. In the context of Exemption 4, a trade secret is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition focuses on a manufacturing process and applies trade secret status exclusively to products, as opposed to services. Likewise, for FOIA purposes, privileged status is limited to records implicating specifically articulated legal privileges such as attorney work product or attorney-client. *See Miller, Anderson, Nash, Yerke & Wiener v. Department of Energy*, 499 F. Supp. 767, 771 (D. Or. 1980). Although many OSPs label their data as privileged or trade secrets, the OSP information does not fit the definitions of these terms as developed in the context of the FOIA.

9. Given these limited applications for trade secret and privileged status, the primary focus in interpreting Exemption 4 has been on the meaning of the term "confidential." Thus, our determination as to whether the monitoring reports can be withheld hinges on whether they can be deemed confidential under Exemption 4. Under the general disclosure scheme established by the FOIA, a company's own treatment of subject material, or even a promise or expectation of confidentiality, as here, is not solely determinative when examining whether information may be withheld. Instead, materials must be examined by a more objective standard to determine whether information can be deemed confidential pursuant to Exemption 4. Commercial or financial materials are held to be confidential when disclosure would be likely to (1) impair the government's ability to obtain necessary information in the future or (2) cause the submitter substantial competitive harm. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks I*).

10. Because the vast majority of OSPs do not acknowledge these standards that apply in responding to FOIA requests for a private party's business data, they do not suggest the manner in which they would be harmed by disclosure of the monitoring information. Nonetheless, we have examined the categories of information contained in the monitoring reports under both the impairment and competitive harm tests established by *National Parks I*. [5]

11. The Commission's continued access to OSP data is unlikely to be jeopardized by a decision to disclose the monitoring reports. In the past, the Commission has invoked the impairment aspect of Exemption 4 only in very limited and specific circumstances: where the Commission's statutory ability to secure necessary data is limited, where the agency has relied largely upon the voluntary assistance of subject carriers who generate material at our behest, or where there is a likelihood that parties could be less forthcoming, interpreting broad information requests in an exceptionally narrow and selective fashion. *See International Satellite, Inc.* (FOIA Control No. 84-93) FCC 84-584 (Dec. 3, 1984); *Western Union Telegraph Company*, 2 FCC Rcd 4485 (1987); *Pan American Satellite*, 4 FCC Rcd 4586 (1989); *Scott J. Rafferty*, 5 FCC Rcd 4138 (1990); *Martha H. Platt*, 5 FCC Rcd 5742 (1990); *J. David Stoner*, 5 FCC Rcd 6458 (1990). None of these situations exist here.

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[5] We have already conducted such an inquiry with respect to cost data contained in AT&T's monitoring report. In response to a recent FOIA request directed only to AT&T's cost data, we concluded that although disclosure of such information would not threaten the Commission's information-gathering abilities, it would likely cause AT&T substantial competitive harm. Letter from Chief, Common Carrier Bureau to Randolph J. May (July 15, 1991).

12. The OSP monitoring reports were not submitted voluntarily or informally. They were provided in response to a Bureau order implementing the requirements of the TOCSIA. Moreover, we perceive no threat of selective compliance since our order specified in clear and explicit terms precisely what information was to be filed. Nor are we concerned that parties would jeopardize their positions before the Commission by deliberately ignoring filing requirements or providing inaccurate or misleading information. The Commission has the authority to institute enforcement action against those OSPs who do not comply with the reporting requirements established in the *OSP Reporting Requirements Order*. The existence of mandatory obligations or a compulsory process for production are relevant to an impairment inquiry and generally operate against such a justification for nondisclosure. Although the authority to compel production does not automatically preclude a finding that release of specific information will impair the government's ability to collect valuable data, we are not concerned that disclosure here would impede the Commission's ability to secure accurate and timely data from regulated entities. Such a finding would imply that the mere suggestion or threat of a challenge to a filing requirement is sufficient to invoke the impairment aspect of Exemption 4. We decline to make such a determination and reserve this provision for the very limited circumstances described above.

13. There is, however, a likelihood of substantial competitive harm if certain information contained in the monitoring reports were to be disclosed in the competitive environment of the operator services industry. Specifically, the cost data contained in these reports qualifies for protection pursuant to Exemption 4 and will be withheld. Cost data and other information that would reveal a company's profit margins have been recognized by the courts as a category of information with considerable competitive implications. *Gulf and Western Industries, Inc. v. U.S.*, 615 F.2d 527 (D.C. Cir. 1979); *Timken Co. v. U. S. Customs Service*, 491 F. Supp. 557 (D. D.C. 1980); *Braintree Electric Light Dept. v. Department of Energy*, 494 F. Supp. 287 (D. D.C. 1980). Disclosure of profit margins carries the obvious risk of enabling parties to underbid or underprice their competitors. It is "virtually axiomatic" that disclosure of detailed financial data showing costs and revenues would, in normal competitive markets, be likely to enable a competitior to gain a substantial and unwarranted advantage. *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D. C Cir 1976).

14. It was a recognition of the particular sensitivity inherent in cost data that prompted our statement in the *OSP Reporting Requirements Order* that we would withhold such data from routine public inspection.[n] Although such an action does not automatically defeat a request for inspection under the FOIA, it places on the FOIA requester the burden of justifying release. 47 C.F.R. §§ 0.457(d)(1), 0.459(h), 0.461(c). In this case, Whitaker has not offered any information supporting the request for disclosure of cost data.

15. While Whitaker has not identified, nor have we yet detected, any public interest concerns sufficient to overrule Exemption 4 and mandate disclosure of cost data at this time, we cannot guarantee perpetual protection for such information. We are still in the early stages of analyzing the monitoring reports and do not yet know precisely what implications or applications the data may have. Therefore, we would not suggest that our decision to withhold cost data in the context of this particular FOIA action precludes any disclosure in the future. Given our obligation under the TOCSIA to continue monitoring operator services activities and to inform Congress of our findings, we may later find that public interest concerns dictate release of cost data, possibly in some manner that could effectively minimize the competitive threat posed by release of the information at such future time.

16. Many OSPs have requested that monitoring information other than that pertaining to costs also be held confidential. These requests for confidentiality will be denied and Whitaker's request for inspection will be granted. While cost data qualifies for withholding under Exemption 4 as explained above, the remaining data pertaining to rates, type of traffic and incidence of complaints do not fit within the scope of the exemption as defined by *National Parks I* and, thus, must be disclosed.

17. Some OSPs contend that they would be harmed by release of data showing the incidence of various types of complaints associated with their services. It has been suggested such information would allow OSPs to solicit customers based on their assessment of their competitors' "service-related capabilities." However, the designated categories of complaints that must be reported to the Commission do not generally relate to service-related capabilities. With the exception of one category labelled as "call quality," the required categories all clearly relate to compliance with statutory requirements or Commission regulations or matters of operational policy identified as areas of concern by the TOCSIA. For example, the reporting of complaints regarding blocking of access to carriers other than the presubscribed carrier or "call splashing" was obviously intended to permit the Commission and, in turn, Congress to gauge whether OSPs are complying with explicit prohibitions against such practices. The possibility of public embarrassment, unfavorable publicity or customer disgruntlement does not, by itself, constitute substantial competitive harm. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154; *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n. 30; *General Electric Co. v. Nuclear Regulatory Commission*, 750 F.2d 1394, 1402 (7th Cir. 1984). The potential for competitors to affirmatively use the complaint data to exploit such possible reactions is diminished by the generality of the information. There is no data that would enable competitors to associate specific types of problems, as recorded by the particular categories of complaints, with specific customers.

18. While individual OSPs may be interested in reviewing competitors' complaint data, it is not likely that our release of such data could be exploited to inflict any

[n] The *OSP Reporting Requirements Order* did not address whether parties desiring that their data be withheld should so indicate by a request for confidential treatment pursuant to Section 0.459 of the rules. Consequently, although it is our usual procedure not to withhold materials from routine public inspection unless clearly requested by the submitter, we have assumed that the OSPs filing monitoring reports intended that their cost data be held confidential. We sought confirmation of this assumption from each carrier in response to the instant FOIA.

significant competitive injury beyond what might already be possible given the general availability of underlying complaint materials through a variety of other forums. The *OSP Reporting Requirements Order* specifically included in the complaints that must be reported "law suits, investigations by state or Federal authorities, and new legislation." 6 FCC Rcd 2314, 2317. Such actions are clearly matters of public record. In addition, complaints against regulated entities lodged with this Commission and state regulatory bodies are typically available for public disclosure. In fact, our rules specifically list complaints, along with related pleadings and documentation, as being routinely available for public inspection. 47 C.F.R. § 0.455(b)(13). While complaints from individuals are sometimes withheld by the Commission to protect the personal privacy interests of the complainant, business entities do not enjoy a similar exemption from disclosure under the FOIA. In addition, complaint information is made available to the public by private entities such as better business bureaus. Although the monitoring reports may reflect some complaints not recorded in a public forum, this compilation does not represent a substantial competitive threat given the general availability of similar complaint data from numerous sources. Likewise, although the complaint data has been compiled and indexed in the monitoring reports, any OSP seeking to highlight a competitor's problems with end user complaints would find ample sources from which to collect such data.

19. No party has explained how rate information could be used to cause substantial competitive harm especially in view of the clear requirement under both the TOCSIA and our rules that such data be publicly available either through informational tariffs filed with the Commission or over the telephone upon request by a customer. [7] Likewise, we will not withhold the comparative percentages of hotel and public traffic despite some parties' suggestions that such material reveals marketing strategies. Such data may show, on a total company basis, what particular classes of business an individual OSP has either chosen to focus upon or been successful in attracting. However, since the data are presented on a company-wide basis, they do not reflect this information by discrete service areas that would enable competitors to determine what classes of customers it might be advantageous to target. Moreover, the data provide no clues that would permit competitors to identify particular customers. Thus, the actual competitive utility of the hotel versus public traffic percentages is slight especially in circumstances where an OSP does not operate in an extremely limited geographical area. Further, as with the rate data, the TOCSIA clearly requires that such percentages be included in informational tariffs which must, under the statute, be available for public inspection. [8]

20. Although the Whitaker FOIA request relates only to public availability of the monitoring reports, several related but discrete issues have been raised by the information submitted by various OSPs in connection with the FOIA action and our analysis of the underlying material. First, our review of the reports indicates that a significant number of OSPs have either failed to file all the required information or, in many instances, any report at all. We remind all OSPs of their mandatory obligation to submit complete reports on a timely basis. Without such information, the Commission cannot comply with the requirement under TOCSIA to apprise Congress of significant problems or trends associated with the provision of operator services. We are committed to obtaining the information essential to accomplish this task and will institute whatever means are necessary to ensure full compliance with our filing requirements, including imposition of forfeitures or issuance of compulsory orders. In addition to the problem of incomplete submissions, a number of submitters have failed to include in their reports important information such as the company address. Commission personnel should not have to search other records to attempt to discover information as basic and important as a company's address.

21. In addition to such problems involving data actually submitted in the monitoring reports, a number of OSPs have included confidentiality requests for entirely separate records in their responses to the Whitaker FOIA. For instance, some parties now seek confidential status for their informational tariffs which were filed in January 1991 and, according to the requirements of the TOCSIA, have been routinely available for public inspection at Commission headquarters. One party has asked that we protect any complaints received by the Commission regarding its operations. [9] Still other parties have requested that all materials that ever have been or ever will be submitted to the Commission be held in confidence. These requests for confidentiality all ignore the most basic requirements of our rules. While any party submitting material to the Commission may request that it be withheld from inspection, such a request must clearly identify the materials to which it applies and state "the reasons for withholding the materials from inspection... and... the facts upon which those reasons are based." 47 C.F.R. § 0.459(b). As a basic matter, the rules clearly anticipate that any request for confidential treatment will be made at the time materials are actually submitted. 47 C.F.R. § 0.459(a). The standard for granting such requests requires parties to demonstrate "by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act." 47 C.F.R. § 0.459(d). None of these requirements have been met in the extraneous confidentiality requests identified above.

22. In addition, most of the confidentiality requests relating to the monitoring reports themselves also fail to meet these basic requirements. Because we recognized that many OSPs are unfamiliar with Commission regulations and procedures and may have been confused as to the precise degree of protection extended to their monitoring data under the *OSP Reporting Requirements Order*,

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[7] 47 U.S.C. §§ 226(h)(1)(A), (b)(1)(C)(i); 47 C.F.R. §§ 64.703(a)(3)(A).

[8] 47 U.S.C. § 226(h)(1)(A).

[9] As noted above, complaints filed with the Commission are identified in our rules as being routinely available for public inspection. 47 C.F.R. § 0.455(b)(13). The Commission has, thus, determined that as a general class of records, complaints do not qualify for non-disclosure. Although this presumption of public availability does not preclude a party from arguing that a particular complaint or related document should be withheld under a specific provision of the FOIA, such requests for confidentiality must make the showing required under Section 0.459 of the rules. 47 C.F.R. § 0.459.

we did not reject any confidentiality claim for failing to comply with our rules. However, we are authorized to refuse to consider such casual claims that are not presented in accordance with the rules. 47 C.F.R. § 0.457(c). We have, in this case, examined in detail each category of information for which protection has been sought and considered any possible basis for non-disclosure under the FOIA. Parties should be aware that absent any new and compelling evidence clearly demonstrating competitive sensitivity, we intend, in evaluating future submissions, to adhere to our ruling that of the categories of information contained in the monitoring reports, only cost data qualifies for withholding under the FOIA. Any requests seeking protection for additional data without making the requisite showing will be summarily denied.

23. Finally, with respect to our ruling here, we will require all parties who have already filed monitoring reports [10] to resubmit their reports in two clearly marked versions, within ten working days from the date this order is released. OSPs who have not yet filed reports for the first monitoring period should also submit their data within this time frame. The non-public version should contain all the data set forth in the *OSP Reporting Requirements Order*. In accordance with our finding of confidentiality, cost data should be deleted from the public version, which will be placed in the docket file for routine public inspection. [11] An original and two copies of both the public and non-public reports should be filed with the Secretary, room 222, 1919 M Street, N.W., Washington, D.C. 20554.

IV. CONCLUSION AND ORDERING CLAUSES

24. Portions of the OSP monitoring reports containing rate and complaint information shall be released. However, such information cannot actually be disclosed until the OSPs who have sought confidential treatment have had an opportunity to exhaust their appeal rights. All OSPs who have sought confidential treatment for information other than cost data may file applications for review of the Bureau's decision to order release of such data. Whitaker may file an application for review of the Bureau's decision to withhold the cost data. Applications for review should be delivered or mailed to the Office of the General Counsel, room 614, 1919 M Street, N.W., Washington, D.C. 20554, and served on all opposing parties. Applications for review must be received within ten working days from the date this order is released. 47 C.F.R. § 0.461(h)(2).

25. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. § 0.291, that the request for inspection filed by Stuart A. Whitaker is GRANTED IN PART and DENIED IN PART, as set forth above.

26. IT IS FURTHER ORDERED that the requests for confidentiality of monitoring reports filed by the OSPs are GRANTED IN PART and DENIED IN PART.

27. IT IS FURTHER ORDERED that requests for confidentiality of other OSP-related records held by the Commission, such as complaints and informational tariffs, are DENIED.

28. IT IS FURTHER ORDERED that all providers of interstate operator services SHALL FILE public and non-public monitoring reports as designated above.

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[10] See Appendix A.

[11] Although we did not require the filing of public and non-public versions when we adopted the *OSP Reporting Requirements Order*, such separate submissions are clearly anticipated by our rules. 47 C.F.R. § 0.459(a). In this case, separate submissions will serve the interests of both the Commission and the OSPs asserting confidentiality for their cost data. Given the number of reports at issue and the disparate formats employed, we are concerned that any effort by the Commission to edit existing reports would increase the risk of inadvertant disclosure, as well creating an unwarranted burden upon Commission staff.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

APPENDIX A

List of OSP Monitoring Reports

2001 Telecommunications, Inc.
A. A. A. Payphone Inc.
A/J Communications
AAA Pay Telephone Systems
Adtel Communications, Inc.
Advanced Business Telephone, Inc.
Advanced Communication Technologies
Advanced Lightwave Communications Inc.
Advanced Technologies Telecommunications Management Systems
Afford-A-Call Corp.
Alascom, Inc.
Allegheny Telephone Co.
Allvend, Inc.
Altus Technologies, Inc.
Americall Systems of Louisville
American Network Exchange, Inc.
American Payphones
American Public Communications, Inc.
American Public & Private Communications, Inc.
American Telecommunications Corporation
American Telephone and Telegraph Company
Ameriphone, Inc.
Ameritech Services
Anthony Wayne Vending d/b/a AWV Payphones
Apollo Communications, Inc.
Ascom Autelca Communications, Ltd.
Austin PayFones, Inc.
Automatic Telephone Systems
B. B. I.
Bell Atlantic
Bell South
Botel Co.
C. N. Johnson Holding d/b/a Tataka
Cable & Wireless Communications, Inc.
Call America Business Communications
Call Communications, Incorporated
Call Concepts Corporation
Call Technology Corporation
Call West
Capital Network System, Inc.
Carolina Payphone Systems
Carolina Telcom Inc.
Central Telephone
Century Area Long Lines
Chadwick Telephone
Charge-A-Call
Charter Network
Cherokee Communications
Chester Long Distance Services, Inc.
Chillicothe Long Distance
Cincinnati Bell
Cleartel Communications, Inc.
Clifton Phone System Operator Services, Inc.
Coastal Automated Communications Corp.
Coastal Payphone Systems Inc.
Coin Plus
Coin Phones, Inc.
Coin Phone Management Co.
Coin Telephones, Inc.
Coin-Call Corp.
Columbus Telephone Company, Inc.
Com Systems
Com-Tech Systems
Computerized Payphone Systems
ComTel Computer Corp.
Connect-U. S. Inc.
ConQuest Operator Services Corp.
Consolidated Communications
Craw-Kan Telephone Cooperative Inc.
CTS Communications, Inc.
Cunningham Telephone Company
D & A Communications, Inc.
D. Cramer Communications, Inc.
Delmarva Toll Call
Eastern Missouri Telephone Company
Elcotel Inc.
Equicom Communications Inc.
Family Communications System
First Phone of New England, Inc.
Florida Public Telephone, Inc.
Fone America, Inc.
Fort Wayne Payphones Inc.
Gilbert Communications
Gorham Telephone Company

Grand River Mutual Telephone Corporation
GTE Telephone Operating Companies
H & B Communications, Inc.
H. C. I.
Hare Office Products and Communications
Haviland Telephone Company, Inc.
HF Communications Corporation
Hospitality Communications Corporation
Hotel Digital Network
Hotel Networks Corp.
Hylton Company
In Media Res Telecom
Independent Telecommunications Services
Indiana Telcom Corporation
Integrated Telecom Services Corporation
Intellicall Operator Services, Inc.
Intellicall Vending, Inc.
Intelliphone, Inc.
International Pacific
International Telecharge, Inc.
Interstate Public Telephone Company
Interwest Telecom Company
Island Payphone Systems, Inc.
Jay Telephone
Kantel Communications, Inc.
Kingdom Telephone Company
Lathrop Telephone Company
LDDS Communications, Inc.
Lexington Telephone Company
LiTel Communications, Inc.
Long Distance America
Long Distance Service, Inc.
M G Communications Inc.
Madison Telephone Co. Inc.
Madison County Telephone Co., Inc.
MCI Telecounications Corporation
Metromedia/HotelNet, Inc.
Missouri Telephone Company
Moundridge Telephone Company
Murdock, Remmers & Assoc.
National Brands, Inc. d/b/a Sharenet Communications Company
National Communications, Inc.
National Convenience Stores
National Operator Services
National Payphone Network Inc.
National Technical Associates
National Telcom Inc.
National Tele-sav, Inc.
Nationcall, Inc.
Network Operator Services
Nevada Bell
Northeast Phone Systems, Inc.
Northern Florida Telephone Company
One Call Communications, Inc. d/b/a OPTICOM
Operator Services West
Pacific Telecom
Pacific Western Associates
Paramount Communications Systems, Inc.
Pay Tel Communications, Inc.
Pay Telephone America, Ltd.
PayCom Systems Corp.
Payline Systems, Inc.
Payphone Systems/DH Communications
Peoples Telephone Company, Inc.
Perco Telephone Company
Phone America
PhoneTel Technologies Inc.
Pilgrim Telephone, Inc.
PmP Enterprises of Minnesota
Protel Inc.
Public Communication Services, Incorporated
Public Communications Associates LTD, Inc.
Public Communications, Inc.
Quest Communications Corporation
Reliable Payphones
Reliance Telephone Systems, Inc.
Resurgens Communcations Group, Inc.
Rex Telecommunications, Inc.
Rochester Telephone Company
Rock Creek Teleservices, Inc.
Rural Telephone Service Co., Inc.
S. I. /C-T Coin Telephone, Inc.
San Marcos Long Distance
Scott Communications
Sierra Telecommunications, Inc.
Simpson Properties
South Central Telephone Assn., Inc.
South Texas Phone, Inc.
Southeast Pay Telephone, Incorporated
SouthernNet, TeleConnect and TS Communications d/b/a
Telecom*USA
Southnet Corporation
Southwest Arkansas Telephone Co-op, Inc.
Southwest Pay Telephone Systems, Inc.

Southwestern Bell Corporation
Sovran Bank, N. A.
St. Joseph Telephone and Telegraph Company
Stenocall
Strategic Alliances Inc.
Sunflower Telephone Co., Inc.
Tel-A-Vend
Tel-West Communications Systems, Inc.
Tela Leasing Enterprises Co.
Tele/Data Services of Pa.
TeleCoin Communications, Ltd.
Telecom Tariff Consultants
Telefonica Larga Distancia de Peurto Rico
Telesphere Communications Inc.
Teltrust Inc.
Texas Coinphone
The Council Grove Telephone Company
Tilton Tel, Inc.
Totah Telephone Company, Inc.
U S West, Inc.
U. S. Intella-West, Inc.
U. S. Long Distance, Inc.
U. S. Operators, Inc.
U. S. Osiris Corporation
U. S. Teleservices, Inc.
United Inter-Mountain Telephone Company
United Tele-Services, Inc.
United Tele-Systems of Va., Inc.
United Teleconnect, Inc.
United Telephone Co. of Kansas
United Telephone Long Distance
US Fiberline Communications, Inc.
US Sprint
Value-Added Communications, Inc.
Vyvx
WCS Operators, Ltd.
Western Telephone Pay Phone
Wheeling Telephone Company
Wilson Telephone Company
Winslow Ventures
World Communications, Inc.
WPI Telecommunications Co.

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